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DEFENSE DEPARTMENT PURSUIT OF INSURERS
FOR SUPERFUND COST RECOVERY

A Thesis
Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either the Judge Advocate General's School, the United States Army, or any other governmental agency.

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DEFENSE DEPARTMENT PURSUIT OF INSURERS
FOR SUPERFUND COST RECOVERY

By Major Michele McAninch Miller

ABSTRACT: The military has a substantial financial interest in pursuing government contractors' insurance carriers for indemnification of Superfund response costs paid by the government. The issue of the scope of coverage under the comprehensive general liability policy for environmental and hazardous waste cleanup costs is heavily litigated in all courts. The courts addressing the issues have unnecessarily created a patchwork of inconsistency, rendering the decision of whether to litigate a difficult one for the military.

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DEFENSE DEPARTMENT PURSUIT OF INSURERS
FOR SUPERFUND COST RECOVERY

Defense and the environment is not an either/or proposition. To choose between them is impossible in this real world of serious defense threats and genuine environmental concerns. The real choice is whether we are going to build a new environmental ethic into the daily business of defense.¹

I. INTRODUCTION

In the past several years, the Department of Defense (DOD) has embarked on an environmental cleanup effort that "represents nothing less than a new strategic goal for the military."² With some 17,500 defense sites on over 1800 installations being examined for environmental problems, the financial stakes are high.³ In 1991 alone the Defense Department spent some 900 million dollars on environmental restoration, with additional expenditures of 1.3 billion dollars projected for fiscal year 1992.⁴ The official total

estimated cost for completing all necessary environmental cleanup is forty billion dollars, but some commentators estimate that the Defense Department cleanup could eventually cost as high as ten times that estimate, and take as long as thirty years to complete.⁵

While much of the cleanup effort may be driven by the Defense Department's recognition of the magnitude of its environmental damages and a spirit of voluntary compliance, that is not entirely the case. In the past two decades, government contractor operations, particularly at industrial facilities for the production or destruction of munitions, have come under increasing scrutiny by federal and state regulators and environmental groups. As a result of past operation and disposal practices, the military is now faced with a plethora of environmental and hazardous waste problems at current and formerly-used defense sites.⁶

In addition, since the mid-1980s, the U.S. Environmental Protection Agency (EPA) has adopted a policy of aggressive pursuit of government contractors

operating at military facilities and bases.⁷ In 1991, ninety-four defense facilities were listed as priorities for cleanup on the National Priority List (NPL),⁸ established by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or Superfund.⁹

The military has a substantial interest in the progress and outcome of CERCLA actions at federal facilities. As a current owner and operator of the facility, DOD itself is a potentially responsible party in these situations.¹⁰ Although the federal government cannot directly sue DOD agencies for CERCLA enforcement actions, the military agencies are subject to cost recovery actions by states or private parties for the money they expend for cleanup costs.¹¹

The military departments are also subject to suits by states acting as natural resources trustees under CERCLA, and may be brought into a case on a claim for contribution or indemnification.¹² In addition, executive requirements compel DOD to conduct cleanup operations on its installations in conjunction with EPA

priorities and plans.¹³

Under certain circumstances, the military departments may bear all or part of the CERCLA cleanup costs a defense contractor's hazardous waste and other environmental pollution at active or former defense sites.¹⁴ Such payment may be the result of cost recovery clauses under the applicable contract, or indemnification procedures authorized by the Federal Acquisition Regulation (FAR) or statute.¹⁵ If the contractor's operations were covered by a commercial insurance policy, the military can then seek indemnification from the insurer for its costs expended on behalf of the contractor.

Seeking recovery from the contractor's insurance company is no simple matter. The dispute between policyholders and insurers over coverage under the comprehensive general liability policy for environmental damage and hazardous waste cleanup costs has spawned one of today's hottest legal battles.¹⁶ State and federal courts, in their attempt to apply state insurance law, have created a patchwork of

inconsistent decisions in this area.¹⁷

Many courts have denied coverage for environmental cleanup costs, based on their interpretations of pollution exclusion clauses and policy terms such as "sudden" and "damages." Others have held in favor of policyholders, rejecting overly technical constructions and artificial distinctions in interpreting insurance policy terms. This article reviews and analyzes the court's decisions interpreting the scope of the comprehensive general liability policy.

As background, this article first generally reviews the CERCLA statutory scheme. It then examines the relationships between DOD and defense contractors which give rise to Defense Department payment of contractors' environmental cleanup costs. After reviewing and analyzing the extensive body of case law addressing insurance coverage for environmental costs, this article will conclude with suggestions for Defense Department representatives contemplating litigation in this area.

II. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA)

A. GENERAL SCHEME

Congress passed CERCLA in 1980 to provide a mechanism for cleaning up inactive hazardous waste disposal sites. In 1986 the Act was amended by the Superfund Amendments and Reauthorization Act (SARA), which was designed to generally strengthen existing authority to clean up Superfund sites.¹⁸

The Environmental Protection Agency (EPA) generally has several options for achieving this goal. CERCLA section 106 allows EPA to order the responsible party to clean up the site.¹⁹ Alternatively, the EPA may clean up the site and then seek reimbursement from the responsible party or parties.²⁰ CERCLA also provides that the government may sue responsible parties for loss of value to the environment caused by the pollution.²¹ The EPA and the responsible party may enter an agreement as to how the party will handle the cleanup, which is usually formalized in a consent

decree.²²

In addition, state governments may, with EPA approval, carry out CERCLA cleanup actions using state funds, and then seek reimbursement from responsible parties. The statute also authorizes any person²³, including the United States, to file a citizen suit in federal court against any party, including the United States, who is allegedly in violation of any CERCLA standard, regulation, or order.²⁴ Such suits can seek injunctive relief and civil penalties.²⁵

B. POTENTIALLY RESPONSIBLE PARTIES

CERCLA reaches a broad spectrum of potential polluters, referred to as "potentially responsible parties" or "PRPs." PRPs include four categories of parties: (1) current owners and operators of facilities; (2) past owners and operators at the time during which hazardous wastes were disposed; (3) generators, that is, those who arranged for disposal, treatment, or transport of hazardous substances; and (4) transporters of hazardous substances.²⁶

The 1986 SARA extended CERCLA application to facilities owned or operated by federal agencies and instrumentalities, including the Department of Defense (DOD).²⁷ The Department of Defense can, therefore, be a PRP for cleanup costs at DOD facilities, as owner, operator, generator, or transporter. The military department remains a potentially responsible party even if the facility is leased or operated by a government contractor. The contractor operating or leasing a government facility is also potentially responsible as an "operator," despite government ownership of the facility.

Under CERCLA section 107(a), present and past contractors and other third persons operating on government owned installations and facilities are also potentially liable for hazardous waste cleanup costs as "generators."²⁸ They will be liable even if they did not own the hazardous material or facility or generate the waste, but only operated the facility or made arrangements to dispose of the hazardous waste.²⁹ Under CERCLA section 107(a)(4), contractors can also be

liable as PRPs if they merely transport hazardous waste for disposal.³⁰

C. CERCLA LIABILITY STANDARDS

One of CERCLA's key features is that the standard of liability is strict.³¹ Claims of due care, lack of negligence, or unforeseeability do not avoid liability under the Act. Under a strict liability standard, liability attaches to a PRP regardless of when the hazardous waste was deposited, who was at fault, or the degree of fault. Liability for CERCLA response costs is also retroactive.³² That is, responsible parties can be held liable for releases that occurred before the statute was enacted, even if they acted reasonably and employed state-of-the-art technology.³³

A third important feature of CERCLA is that liability may also be joint and several if the harm is not readily divisible.³⁴ Although the Act does not explicitly provide for joint and several liability, courts have created federal common law in this area by finding that joint and several liability is supported

by CERCLA's scope and importance.³⁵ Thus, a PRP's liability may increase as a result of the actions of a party over whom he has no control. Apportionment of response costs is allowed if the PRPs' proportionate shares can be established, but the burden is on the defendants.³⁶

D. RIGHT OF CONTRIBUTION

CERCLA section 113(f) was added by SARA in 1986 to create an express right of contribution between liable PRPs,³⁷ codifying the common law right previously recognized by courts.³⁸ Thus a CERCLA PRP held jointly and severally liable may seek contribution from other PRPs. The amendment also gives courts latitude in resolving contribution claims to allocate response costs among PRPs using such equitable factors as the court determines are appropriate.³⁹

Parties who resolve their liability to the United States or a state in an administrative or judicially approved settlement are protected under the amendment from claims for contribution from other PRPs for

liabilities resolved in the settlement.⁴⁰ Parties entering into settlement agreements with the government may, however, seek contribution from responsible parties who are not party to the settlement.⁴¹

III. DEPARTMENT OF DEFENSE AND DEFENSE CONTRACTORS

A. GENERAL

Under CERCLA section 107(e), agreements between parties to hold insure, hold harmless, or indemnify each other for CERCLA liability are not prohibited.⁴² "CERCLA expressly reserves the right of parties to contractually transfer to or release another from the financial responsibility arising out of CERCLA liability."⁴³ Therefore, DOD may agree in the applicable contract to assume a government contractor's hazardous waste cleanup costs. No such contractual arrangement or other agreement can shift or negate CERCLA liability, however.⁴⁴

Even if the military department agrees to pay the contractor's cleanup costs, the contractor remains a

potentially responsible party. The military will have a contractual claim for reimbursement, and possibly a claim for contribution, from the contractor. If the contractor is insured, the military's claim for reimbursement can be made against the contractor's insurer.

B. DOD PAYMENT OF CONTRACTORS' CLEANUP COSTS

There are a number of different scenarios under which the military department may agree to pay contractors' hazardous waste or pollution cleanup costs, for which the military may later attempt to seek recovery from a contractor's insurance carrier.

1. DOD Cleanup of Sites

The Secretary of Defense has responsibility and authority for enforcing CERCLA cleanups on DOD facilities.⁴⁵ At DOD-owned and -operated or DOD-owned and contractor-operated facilities, DOD is generally responsible for either financing response actions or assuring that another party does so.⁴⁶ If a release of

hazardous substances results only in contamination on the military facility itself, DOD is required to conduct and finance the response action or ensure that it is done by someone else.⁴⁷

If contamination occurs both on and off the facility and the evidence clearly demonstrates that the military is the only source, DOD is, again, required to take action.⁴⁸ In cases where there is contamination off the installation and it is not clear that DOD is the only source, EPA is required to finance and conduct the investigations and studies off the facility, while DOD is responsible for the same actions on the installation. If the investigation reveals that the military facility was the sole source of contamination, DOD will conduct and finance cleanup actions and reimburse EPA for its costs.⁴⁹

2. Cost Recovery Under the Contract

Perhaps the most significant area in which recovery for environmental cleanup costs arises is with government-owned, contractor-operated (GOCO) munitions

facilities. GOCO facilities are the prime suppliers of the country's military munitions supply.⁵⁰ The GOCO arrangement calls for government ownership of the production facilities and equipment, and contractor management and operation of the production facility pursuant to one or more contracts with the government.

Two contracts form the basis for most GOCO operations -- a facilities contract, which is in the nature of a lease arrangement, and a production contract dealing with the goods and services to be produced at the facility.⁵¹ Under the facilities contract the military provides the contractor the facilities to be used in producing products or providing services under the production contracts. Both facilities contracts and production contracts are normally cost-type contracts, with the government reimbursing the contractor for expenses involved in maintaining the facility.⁵²

In the case of a cost-reimbursement contract of this type, the military may allow recovery of the contractor's costs associated with environmental

cleanup. Cost principles in the Federal Acquisition Regulation (FAR)⁵³ authorize payment for "allowable" costs, which, as a general rule, must be reasonable, allocable, and not specifically prohibited by regulation or the terms of the contract.⁵⁴ Although environmental cleanup costs are not specifically addressed in the FAR or the Defense Federal Acquisition Regulation Supplement (DFARS)⁵⁵, they can be allowed as direct costs if they are allocable to the contract. Alternatively, the contractor may have included the costs of environmental cleanup in its overhead costs as an indirect cost of production under the production contract.⁵⁶

3. Indemnification

The military may also reimburse a contractor for environmental response costs pursuant to an indemnification provision in the contract. Such indemnification is authorized both by regulation and statute, and can be used in either fixed-price or cost-type contracts.

a. Contractual Indemnification

GOCO facilities contracts include a FAR clause entitled "Insurance - Liability to Third Persons."⁵⁷ This clause provides for military indemnification of contractors for liabilities and related expenses to third persons arising out of performance of the contract. Reimbursable liabilities are for death and bodily injury, and for property damage or loss.⁵⁸

Military indemnification for property liability, however, is not unlimited. The FAR restricts reimbursement to property loss or damage other than to property owned, occupied, or used by the contractor, rented to the contractor, or in the care, custody, or control of the contractor.⁵⁹ Thus, government financial support for environmental cleanup costs incurred on the government property occupied by the contractor's facility is disallowed. The military would, however, normally indemnify for off-site cleanups compelled by the government or private citizen suit, provided the contractor can show that the costs are allocable against the current contract.⁶⁰

Several other restrictions significantly limit the scope of indemnification under The Liability to Third Persons clause. Government liability under the clause is subject to the availability of appropriated funds at the time the contingency occurs.⁶¹ Indemnification is prohibited for liabilities resulting from the contractor's willful misconduct or lack of good faith.⁶² Finally, the FAR limits indemnification to liabilities "not compensated by insurance or otherwise."⁶³ Although the FAR contains no further definition of the phrase "not compensated by insurance or otherwise," a plain reading indicates that it allows indemnification of a contractor who is insured but whose policy limits fall short of its actual liability, thus rendering the full liability noncompensable under the policy.⁶⁴

b. Statutory Indemnification

The National Defense Contracts Act, Public Law 85-804,⁶⁵ provides broad authority for federal agencies, including Department of Defense, to protect contractors

from financial harms not otherwise reimburseable under FAR provisions. In pertinent part, Public Law 85-804 provides:

The President may authorize any department or agency of the Government which exercises functions in connection with the national defense, acting in accordance with regulations prescribed by the President for the protection of the Government, to enter into contracts or into amendments or modifications of contracts heretofore or hereafter made and to make advance payments thereon, without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he deems that such action would facilitate the national defense.⁶⁶

Although the statute never specifically addresses indemnification, the Act's legislative history makes it clear that Congress intended to provide such authority in facilitation of the national defense.⁶⁷ The authority to indemnify is an extraordinary remedy, not to be used when other adequate legal relief exists

within the agency.⁶⁸

The Executive Order implementing the Act further defines the parameters of Public Law 85-804.⁶⁹ The Executive Order limits indemnification to previously authorized and appropriated fund ceilings, with one significant exception. The exception allows contractor indemnification without regard to appropriated fund limitations for "claims or losses arising out of or resulting from risks that the contract defines as unusually hazardous or nuclear in nature."⁷⁰

Given the absence of an Anti-Deficiency Act concern, the Defense Department has come to regard Public Law 85-804 indemnification as the primary means to protect contractors from catastrophic financial harm and to ensure a pool of defense contractors willing to operate munitions facilities.⁷¹ Accordingly, the Secretary of the Army has applied an expansive definition of the term "unusually hazardous activities."

The Army's definition includes "exposure to toxic

chemicals or other hazardous materials arising from the receiving, handling, storage, transportation, loading, assembling, packing, and testing of such chemicals or materials and thus damages arising out of the use, disposal, or spillage of such toxic chemicals and other hazardous materials are covered, including environmental damages."⁷²

Thus the Army provides broad financial support for government contractors whose activities involve substances that are not nuclear-related or obviously hazardous in nature, but which are toxic or considered hazardous within the meaning of environmental statutes.⁷³

In addition to the instructions found in Executive Order 10789, policies and procedures for use of Public Law 85-804 indemnification can be found in the Federal Acquisition Regulation.⁷⁴ The FAR provides that indemnification may not be used in a manner that "encourages carelessness and laxity on the part of persons engaged in the defense effort."⁷⁵ This requirement is underscored by the Department of the

Army's prohibition against indemnification for intentional and knowing acts of contractor misconduct.⁷⁶

Recent Secretary of the Army Public Law 85-804 determinations clarify that indemnification is not available for non-sudden releases⁷⁷ if the government can show that the release was the result of non-compliance, with the knowledge or intent of the contractor's principal officers, with environmental laws or regulations applicable at the time of the release.⁷⁸

In summary, through contractual and statutory indemnification provisions, the government may reimburse its contractors for costs of environmental compliance and restoration. Subsequent to the indemnification, the agency may then be able to pursue reimbursement of some or all of its costs from the contractor's insurance carrier if the contractor is insured under a comprehensive general liability policy.

C. INSURANCE REQUIREMENTS FOR DOD CONTRACTORS

Government contractors are not, as a general rule, required to maintain comprehensive general liability insurance. The FAR does, however, outline specific insurance requirements based on the type of contract being performed.

For contractors operating under fixed-price contracts, the government is not normally concerned with the contractor's insurance coverage.⁷⁹ Insurance for fixed-price contractors may, however, be required under some circumstances. If, for example, the contract involves government property or the work is to be performed on a government installation, the agency may specify insurance requirements.⁸⁰ When the agency requires a contractor to maintain insurance, the premiums are generally allowable costs.⁸¹

The FAR ordinarily requires the following types of insurance in cost-reimbursement contracts: workers' compensation in accordance with applicable federal and state statutes, general third party bodily injury liability, automobile liability for operation of all

automobilies used in connection with the contract, and aircraft and vessel liability when applicable.⁸²

The FAR requires property damage liability under cost-reimbursement contracts only in special circumstances as determined by the agency.⁸³ For example, the agency may require such insurance if the risk of contract operations is "such as to warrant obtaining the claims and investigating services of an insurance carrier."⁸⁴ Examples of high risk operations include contractors engaged in the handling of explosives or in extrahazardous research and development activities.

In addition to the FAR requirements outlined above, the agency may require insurance when deemed necessary because of commingling of property, type of operation, circumstances of ownership, or condition of the contract.⁸⁵ Thus, a large GOCO weapons or ammunition facility that engages in sales of products to other DOD suppliers or for export will normally be required to maintain, at a minimum, property damage liability coverage, and possibly a comprehensive

general liability (CGL) policy covering general liabilities to third persons.

In summary, although there is no general requirement for a government contractor to maintain a CGL policy, there are a number of circumstances under which the agency may require coverage. In the absence of a specific requirement, a contractor may always carry the insurance at its own option, particularly if the firm is engaged in production other than under the government contract.

IV. COMPREHENSIVE GENERAL LIABILITY INSURANCE

A. GENERAL

Most businesses, including many government contractors, purchase insurance policies to provide protection against liability arising from activities incident to their operations. Since 1966, the insurance industry's primary form of commercial insurance coverage has been the comprehensive general liability ("CGL") policy. The CGL policy does just

what its name implies -- insures policyholders in a comprehensive way against liability to third persons, embracing all hazards not specifically excluded.⁸⁶

Unlike most ordinary contracts, the typical insurance contract is not the product of negotiation and compromise between the contracting parties. Rather, it is a contract of adhesion; the insurance company drafts it and the policyholder must take it or leave it as written.⁸⁷ A CGL policy can be described as litigation insurance as well as indemnification insurance, because it also requires the insurance carrier to defend the policyholder in suits in which the complaint arguably falls within the policy terms.⁸⁸ The duty to defend is distinct from and broader than the duty to indemnify. For example, an insurer must defend multiple-count complaints if any one of the counts contains issues potentially within the scope of the policy's coverage.⁸⁹

Between 1940 and 1971, the CGL policy sold by American commercial liability insurance carriers was drafted by either the Insurance Rating Bureau (IRB) or

the Mutual Insurance Rating Bureau (MIRB).⁹⁰ In 1971 the IRB and MIRB merged to form the Insurance Services Office, Inc. (ISO). The ISO, the insurance industry trade organization which encompasses the majority of all major insurance companies in the United States, now drafts and revises the standard-form CGL policy.⁹¹

B. INSURANCE COVERAGE FOR POLLUTION DAMAGE

Insurance coverage for pollution damage increasingly has been the subject of litigation in state and federal courts. As a general rule, the CGL policies litigated in courts today were drafted long before CERCLA was enacted in 1980. Therefore when the insurance industry used terms such as "property damage" and "occurrence," they described traditional types of liability with which both insurers and policyholders were familiar.⁹² CERCLA, however, has created new forms of liability that do not readily fit into the preexisting policies' traditional definitions and descriptions.⁹³

Accordingly, a number of issues involving

insurance coverage for pollution damage have arisen in the past two decades. The three issues litigated most frequently involve: (a) the scope of the pollution exclusion clause; (b) the meaning of the "as damages" clause; and (c) the definition of "occurrence."⁹⁴

The standard CGL policy has undergone a number of revisions in the past three decades.⁹⁵ Each change has significantly impacted on coverage for environmental pollution. A review of the history and evolution of the CGL policy is vital to an understanding of the policy issues currently being litigated.

C. EVOLUTION OF THE STANDARD CGL POLICY

1. Pre-1966 - Accident-Based Coverage

The insurance industry's trade associations drafted standard-form CGL policies in 1941, 1947, 1955, 1966, and 1973.⁹⁶ Before 1966, the CGL policy provided accident-based coverage, that is, it indemnified for damage caused by "accidents."⁹⁷ Because the word "accident" was never defined in the

standard policy, courts struggled with the distinction between accidents and nonaccidents.⁹⁸

In interpreting the pre-1966 accident-based policy, one of the more troublesome areas for courts was determining whether injuries or property damage caused by gradual events or processes could be considered "accidents".⁹⁹ Although the policy did not contain an exclusion for injury or damage resulting from gradual events such as contamination, many courts limited their interpretation of "accident" to sudden and identifiable events.¹⁰⁰ This ambiguity led, in part, to the 1966 amendment of the CGL policy language to occurrence-based coverage.

2. 1966 - Occurrence-Based Coverage

In 1966 the new CGL policy shifted to occurrence-based coverage, providing that "the company will pay on behalf of the insured all sums which the insured shall become legally liable to pay as damages because of bodily injury or property damage to which this insurance applies caused by an occurrence" ¹⁰¹

The new policy defined the word "occurrence" as "an accident, including injurious exposure to conditions, which results during the policy period in bodily injury or property damage neither expected nor intended from the standpoint of the insured."¹⁰² The insurance industry made this change for several reasons. The first was to clarify the meaning of the word "accident," as the lack of that definition had been at the heart of frequent litigation in the past."¹⁰³

Another reason the insurance industry shifted from accident-based to occurrence-based coverage was to satisfy public demand for expanded coverage, particularly for manufacturers who were concerned about gradual pollution damage.¹⁰⁴ According to insurance industry representatives, the new policy not only continued to provide coverage for unexpected or unintended pollution damage, as it always had, but it also provided significantly expanded coverage.¹⁰⁵

For example, the Assistant Secretary of Liberty

Mutual Insurance Company stated in a paper presented at an insurance industry technical conference, that "it is in the waste disposal area . . . that coverage is liberalized most substantially."¹⁰⁶ The paper continued to make clear that manufacturers of insecticides, fertilizers, paints, chemicals, and the like, who produce smoke, fumes or other air or stream pollution, have severe gradual property damage exposure.¹⁰⁷ The author concluded that "[t]hey need this protection and should legitimately expect to be able to buy it, so we have provided it."¹⁰⁸

Many other public statements in a similar vein were made by insurance industry representatives, the very people who helped draft and approve the CGL policy language.¹⁰⁹ Virtually all of the public statements supported the proposition that the 1966 occurrence-based CGL policy was intended to cover liabilities resulting from gradual pollution events, neither expected nor intended by the insured.¹¹⁰ This background is key to understanding the scope of the CGL policy's coverage after further modification in 1970.

3. 1970/1973 - Pollution Exclusion Policy

In 1970 the insurance industry began issuing an endorsement excluding coverage for certain types of pollution damage, and in 1973 incorporated the clause into the standard policy form as an exclusion.¹¹¹ The clause excluded insurance coverage for property damage caused by pollution unless the discharge was "sudden and accidental."¹¹² In full, the clause provides that coverage is not available for:

Contamination or Pollution Exclusion. Bodily injury or property damages arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste material or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.¹¹³ The meaning of the clause, when coupled with the language of the occurrence-based CGL policy, is

not immediately clear. The definition of "occurrence" in the standard policy indicates that pollution damage is covered.¹¹⁴ Then the pollution exclusion clause appears to eliminate coverage for all pollution damage.

Finally, the last phrase in the exclusion clause shifts the focus from the result or damage caused by the polluting event, to the polluting acts themselves. The last phrase appears to restore coverage if the pollution, not the damage, was "sudden and accidental." The clause, however, does not define "sudden and accidental." The clause's ambiguity spawned a tremendous amount of litigation over the scope of the pollution exclusion clause.¹¹⁵

4. 1986 - Pollution Exclusion Clause

Rewritten

In response to increasing numbers of environmental claims and unfavorable court rulings on the scope of the 1973 pollution exclusion clause, the insurance industry again changed the CGL policy.¹¹⁶ In 1986 the pollution exclusion was rewritten to more clearly

exclude coverage for pollution-based claims, resulting in the so-called absolute pollution exclusion.¹¹⁷ Pollution coverage today is generally available only through Environmental Impairment Liability (EIL) policies, which provide minimal coverage at great expense.¹¹⁸

As virtually all of the cases a military litigator will address involve insurance policies written prior to the latest CGL policy change, the 1986 absolute pollution exclusion will not be further addressed. Because CERCLA cleanup claims are retroactive and can span decades, however, litigation over the meaning of the 1973 standard pollution exclusion remains a key coverage issue.

V. JUDICIAL INTERPRETATION OF POLLUTION EXCLUSION CLAUSE

Litigation over the meaning of the pollution exclusion clause has focused primarily on the meaning of the "sudden and accidental" exception to the exclusion. The pivotal interpretation issue has been

whether, as insurance companies argue, the word sudden carries only a temporal meaning, as in "abrupt" or "instantaneous," or whether, as policyholders argue, it is ambiguous and can include an unexpected and unintended release of pollutants or unexpected and unintended pollution damage.¹¹⁹

Courts interpreting the clause have developed two diverging lines of cases. As a general rule, the early decisions held that the pollution exclusion clause is only a restatement of the definition of "occurrence."¹²⁰ Under this analysis, coverage was barred only if the insured expected or intended the pollution damage.¹²¹ After 1984 a line of decisions emerged which generally held that the exclusion clause barred coverage for all pollution-related damage unless the polluting activity occurred instantaneously.¹²²

This Part will first review the rules of construction courts use in interpreting insurance policy terms, followed by a detailed review of the opposing lines of cases. The courts' differing interpretations will then be analyzed.

A. RULES FOR CONSTRUING INSURANCE POLICIES

As contracts, insurance policies are subject to the rules of construction normally used in interpreting regular contracts. The rules generally require that words be given their plain meaning, unless to do so violates public policy.¹²³ Courts usually begin their analysis of insurance policy terms by determining the clarity of the policy's clauses. If the court finds the provisions to be ambiguous, it normally applies the common law maxim of contra proferentum.¹²⁴

Contra proferentum requires that ambiguities in insurance contracts, because they are contracts of adhesion, be strictly construed against the instrument's drafter to maximize coverage.¹²⁵ This is especially true of exclusions.¹²⁶ In interpreting the scope of exclusions, the insurer has the burden of proving that the facts fall within the exclusion rather than the coverage provisions.¹²⁷

In the context of insurance policy construction,

courts generally hold that when a term is capable of more than one reasonable interpretation it must be construed against the drafter and in favor of the policyholder.¹²⁸ On the other hand, if the court finds the clause to be unambiguous, it usually holds in favor of the insurance company.¹²⁹

There are exceptions to the general rule of contra proferentum in the insurance policy context. If, for example, the court finds that the policyholder and the insurance company are in relatively equal bargaining positions, the court is less likely to find the insurance policy to be an adhesion contract and, consequently, less likely to automatically construe ambiguous terms against the insurer.¹³⁰

Courts declining to automatically construe ambiguities against the insurance company have found that the policyholder is of equal bargaining position with the insurer when the insured is not "an innocent," but is an immense corporation, carrying insurance with large annual premiums, managed by sophisticated businessmen and represented by counsel on the same

professional level as counsel for insurers.¹³¹

Likewise, if a court finds that the insured actually bargained over the significant terms of the CGL policy or pollution exclusion, the court may decline to construe the terms in favor of the insurance company.¹³²

B. THE EARLY CASES

One of the earliest cases to interpret the pollution exclusion clause was Lansco, Inc. v. Department of Environmental Protection.¹³³ In Lansco, vandals broke into the plaintiff's oil storage facility and opened storage tank valves, leaking 14,000 gallons of oil onto the property. The oil entered a drainage system and eventually entered the Hackensack River.¹³⁴ Lansco swiftly cleaned up the spill in accordance with instructions from the New Jersey Department of Environmental Protection. Lansco's insurer refused to pay the \$140,000 of clean-up costs eventually incurred.¹³⁵ The insurer argued that the occurrence was neither sudden nor accidental within the meaning of the pollution exclusion clause.¹³⁶

The New Jersey Superior Court reviewed the CGL policy, the pollution exclusion clause, and the pollution exclusion's exception, focusing on the term "sudden and accidental."¹³⁷ The court found that the policy covered Lansco's clean-up costs because the occurrence that caused the oil spill was both sudden and accidental "within the ordinary accepted meaning of those words."¹³⁸ Because the policy did not define "sudden and accidental," the court reasoned that the plain, ordinary and commonly understood meaning of the words must be used.¹³⁹

The Lansco court determined that "sudden" meant happening without notice, an unexpected and unforeseen incident. It similarly defined "accident" as something that happens unexpectedly.¹⁴⁰ Focusing on the insured's viewpoint, the court concluded that since the oil spill was neither expected nor intended by Lansco, the spill was sudden and accidental under the pollution exclusion clause even if caused by the deliberate act of a third party.¹⁴¹

Another early case in which the court found the meaning of the pollution exclusion clause ambiguous was Farm Family Mutual Insurance Co. v. Bagley.¹⁴² In Bagley, neighbors of a farmer whose land had been sprayed with pesticides sued the sprayers for damages to their vineyard and crops. The sprayer's insurance company refused coverage, citing the pollution exclusion clause.¹⁴³

Finding the meaning of the pollution exclusion clause ambiguous, the court concluded that the focus was not on Bagley's intent with respect to the "occurrence," in this case, the crop spraying, but whether the damage caused by the dispersal onto the neighbor's property was expected and intentional.¹⁴⁴ Although the insureds intended to spray the chemicals onto his own land, the court distinguished that discharge from the unexpected, unusual, and unforeseen dispersal of the pesticide onto neighboring land.¹⁴⁵

Although the Bagley court, like the New Jersey court in Lansco, construes the pollution exclusion terms in favor of the policyholder, the court departs

from the Lansco analysis by focusing on the damage rather than the original polluting activity. With this analysis, Bagley adds a twist to the Lansco analysis, which was soon to be followed by a number of courts in the northeast.

The court in Allstate Insurance Company v. Klock Oil¹⁴⁶ followed the Bagley line of reasoning. At issue in Klock Oil was property damage sustained by landowners as the result of a leaking gasoline storage tank that Klock Oil had installed and maintained.¹⁴⁷ Finding the pollution exclusion clause ambiguous, the court opined that the policy must be construed most favorably to the policyholder and strictly against the insurance company.¹⁴⁸ The Klock Oil court noted that this is especially so as to an ambiguity found in an exclusionary clause.¹⁴⁹

The court ruled that the term "sudden" did not mean that the pollution discharge had to occur instantaneously.¹⁵⁰ Instead, as in Bagley, the court defined the phrase "sudden and accidental" by focusing on the resulting harm caused, not on the incident

causing the damage.¹⁵¹ The court concluded that "regardless of the initial intent or lack thereof as it relates to causation, or the period of time involved, if the resulting damage could be viewed as unintended by the factfinder, the total situation could be found to constitute an accident and therefore within the coverage"¹⁵²

The court in Jackson Township Municipal Utilities Authority v. Hartford Accident and Indemnity Company¹⁵³ adopted a similar analysis. Jackson Township involved seepage from a landfill used by the township's municipal utilities authority, which contaminated a nearby aquifer. Town residents sued for personal injury and property damage caused by the contaminated drinking water, alleging that the township negligently selected, maintained, and designed the landfill from which the pollutants had been seeping.¹⁵⁴

The New Jersey Superior Court attempted to synthesize the holdings of Lansco, Bagley, and Klock Oil, noting that the trend in other jurisdictions was to allow coverage despite the pollution exclusion

clause for the unintended results of intentional discharges of pollution.¹⁵⁵ The Jackson Township court found that the pollution exclusion clause was ambiguous, noting that the courts of other jurisdictions were nearly unanimous in finding the same. As such, it must be resolved in favor of the policyholder.¹⁵⁶

The ambiguity, in turn, led the court to focus on the resulting damage rather than the discharge.¹⁵⁷ The court concluded that the pollution exclusion clause "can be interpreted as simply a restatement of the definition of 'occurrence' -- that is, that the policy will cover claims where the injury was neither 'expected nor intended.' "¹⁵⁸

Under this analysis, the pollution exclusion clause will preclude coverage for damage caused when the person who discharged the pollutant knew or should have known that the discharge would result in the injury. If, however, the damage was neither expected nor intended, as in the case of damage from leaking materials in a landfill, the pollution exclusion will

not apply.

Thus Bagley, Klock Oil, and Jackson Township differ from previous cases finding for the policyholder. These cases effectively retrain the type of occurrences for which the pollution exclusion clause precludes coverage. In Lansco, for example, the court found that despite the pollution exclusion clause, the CGL policy covers damages and injuries resulting from an unexpected event.¹⁵⁹ The latter three courts, however, hold that the pollution exclusion clause precludes coverage only when the policyholder intended or expected to cause the injury or damage.

In the years following Jackson Township, several courts followed its rationale, finding that the pollution exclusion bars coverage only where pollution damages, as opposed to releases, were intended or expected by the policyholder.¹⁶⁰ Other courts, however, followed the Lansco example, determining coverage based on whether the policyholder intended or expected the discharge, release, or dispersal.¹⁶¹

C. TREND OF PRO-INSURER DECISIONS

Beginning in 1984, courts began diverging from the viewpoint described above, producing a series of pro-insurer decisions. Most of this later line of cases added an element of duration in deciding whether a release of pollutants was sudden and accidental. In these decisions, courts generally held that the phrase "sudden and accidental" in the pollution exclusion clause only provides coverage for pollution that is virtually instantaneous.

One of the first of this line was Techalloy Company, Inc., v. Reliance Insurance Company.¹⁶² Techalloy involved a toxic tort action in which the injured parties alleged that Techalloy recklessly disposed of trichloroethylene onto their property for over 25 years.¹⁶³ Finding the pollution exclusion clause to be unambiguous, the Pennsylvania Superior Court held that coverage was barred because the discharge took place over the years. Although it could be construed as an "occurrence," it was not instantaneous and was not, therefore, "sudden."¹⁶⁴

The 1986 case Waste Management v. Peerless Insurance Company¹⁶⁵ explicitly rejects the holdings of Lansco, Klock Oil, and Jackson Township. At issue in this case was a suit by the federal government against Waste Management for damages its landfill had caused to the well water of neighboring homes. Waste Management impleaded the trash removal company that brought landfill to the site, who in turn requested defense and indemnification from its insurance company.¹⁶⁶ Holding in favor of the insurance company, the North Carolina Supreme Court found the pollution exclusion clause to be clear and unambiguous.¹⁶⁷

The Waste Management court found that as the word "occurrence" relates to whether an event was intentional or expected, the occurrence-based policy covers only unintentional and unexpected events.¹⁶⁸ Next, the court looked at whether the pollution exclusion clause addresses the type of damage resulting from the event, that is, whether the event causes pollution.¹⁶⁹ Finally, the court determined that coverage is reinstated under the exception to the

pollution exclusion clause only if the events happened instantaneously or precipitantly.¹⁷⁰

Under this three-part analysis, the court concluded that because the trash removal company did not expect the pollutants to enter the groundwater, the event was an "occurrence" under the terms of the CGL policy.¹⁷¹ The pollution exclusion clause, however, excluded coverage because pollution resulted. The exception to the pollution exclusion clause did not support finding coverage because there was no evidence that the release of pollutants was "sudden."¹⁷²

The Waste Management court rejected the Lansco analysis because by construing "sudden" as synonymous with "occurrence" and "accidental," the Lansco court rendered the terms redundant and indistinguishable.¹⁷³ The court also refused to follow Jackson Township and Klock Oil because those courts did not focus on the temporal significance of the term "sudden."¹⁷⁴

Some courts addressing the pollution exclusion clause have taken a slightly different approach,

finding it not necessary to determine whether the word "sudden" is ambiguous. These courts have found that insureds who regularly discharge or deposit materials in the course of business cannot later argue that the damage from their discharging activity was unintended or unexpected.

Illustrative of this approach is Transamerica Insurance Company v. Sunnes,¹⁷⁵ an Oregon case involving the discharge of acid and caustic wastes into a city sewer system by the Culligan Water Conditioning Company. Culligan argued that the pollution exclusion clause should not apply because the damage was unintentional.¹⁷⁶ The court rejected the argument, finding that the clause operated to exclude coverage because, although the damage was unintentional, the discharge of the waste was intentional.¹⁷⁷

The First Circuit in Great Lakes Container Corporation v. National Union Fire Insurance Company of Pittsburgh¹⁷⁸ took a similar approach. Great Lakes, a barrel reconditioning business adjacent to a stream and a wetland, was sued for contaminating soils, surface

waters, and groundwater.¹⁷⁹ The court found that the company's practice of emptying used barrels of their contents, including chemicals and other waste products, was a normal concomitant of the company's regular business activity. As such, there was no "occurrence" within the meaning of the CGL policy, nor any allegation of a sudden and accidental discharge.¹⁸⁰

D. CLARIFICATION OF THE TEMPORAL ELEMENT

As previously discussed, many courts have held that the term "sudden" contains a temporal element of brevity,¹⁸¹ while others have found that "sudden" needs no temporal element.¹⁸² A 1989 case addressed by the Georgia Supreme Court provides perhaps the most well-reasoned analysis on record of the temporal element of "sudden."

Claussen v. Aetna Casualty & Surety Co.¹⁸³ involved discharges of industrial and chemical waste on land owned by the plaintiff and used under contract by the city of Jacksonville as a landfill. After six years of dumping waste on the property, the city returned it to

the plaintiff. The owner, despite his claims that he had no knowledge that the site had been used for dumping hazardous waste, was informed by the EPA that he was responsible for taking corrective action. Plaintiff's insurance company attempted to deny coverage, arguing that the discharge of waste was not sudden and accidental.¹⁸⁴

The Georgia court concluded that the word "sudden" is susceptible of at least two interpretations, and is therefore ambiguous in the context of the pollution exclusion.¹⁸⁵ The court determined that the primary definition of the term is "unexpected."¹⁸⁶ The court acknowledged that "abrupt" is a common use of the word, and is also the definition of "sudden" found in some dictionaries. The court concluded, however, that the commonly understood temporal element of "sudden" is not brevity, but rather, an unexpected onset.¹⁸⁷

The Claussen court rejected the insurance company's argument that construing "sudden" to mean "unexpected" violates the rule of construction that the contract be read so as to give all parts meaning.

Aetna contended that such an interpretation merely restates the definition of "occurrence."¹⁸⁸ The court disagreed, finding that the occurrence-based CGL policy focuses on whether the property damage is unexpected and unintended, while the exclusion clause focuses on whether the discharge or release is unexpected and unintended. The exclusion clause therefore eliminates coverage for damage resulting from intentional or reckless polluting activities.¹⁸⁹

Aetna's third argument was likewise unsuccessful. The court rejected the contention that the plaintiff's construction violates a cardinal rule of contract interpretation because it was inconsistent with the parties' intentions.¹⁹⁰ The insurance company argued that pollution liability is an enormous risk that neither party anticipated when underwriting the policy sixteen years previously. The Claussen court, however, found persuasive documents presented by the Insurance Rating Board to the Georgia Insurance Commissioner when the pollution exclusion was first adopted, which suggested that the clause was intended to exclude only intentional polluters.¹⁹¹

The Wisconsin Supreme Court issued a similarly well-reasoned opinion in the 1990 case Just v. Land Reclamation, Ltd.¹⁹² The facts in Just are similar to those in Claussen. Property owners near a municipal landfill alleged that negligent operation of the landfill by Land Reclamation had gradually contaminated their water and generated foul odors and blowing debris.¹⁹³ Citing a line of Wisconsin cases in support, the defendant's insurer moved for summary judgment, arguing that "sudden and accidental" unambiguously means abrupt and immediate.

As did the Claussen court, the Wisconsin court noted that different dictionaries offered different primary definitions of the word "sudden," rendering the term ambiguous.¹⁹⁴ The court also noted that its conclusion was consistent with "substantial evidence indicating that the insurance industry itself originally intended the phrase to be construed as 'unexpected and unintended.'"¹⁹⁵ The court then conducted one of the most careful judicial scrutinies on record of the drafting and marketing of the 1966 CGL

policy and the 1970/1973 revision. It also closely examined the insurance industry's and drafting organizations' representations regarding the pollution exclusion.¹⁹⁶

Rejecting Wisconsin precedent to the contrary, the Just court concluded that the phrase "sudden and accidental" means unexpected and unintended.¹⁹⁷ Its interpretation, noted the court, was consistent with the IRB's suggestion that the pollution exclusion clause was intended to exclude only intentional acts of pollution and was otherwise not intended to reduce the scope of existing coverage.¹⁹⁸

The Third Circuit recently addressed the same issues in New Castle County v. Hartford Accident & Indemnity Company.¹⁹⁹ As in Claussen and Just, the case involved allegations of environmental damage and injuries as the result of gradual dispersals from a municipal landfill. Following the Georgia and Wisconsin courts' leads, the Third Circuit first reviewed numerous dictionary definitions of the word "sudden," concluding that it is ambiguous in the

context of the pollution exclusion clause.²⁰⁰ Applying Delaware law, the court held that the word should be interpreted as meaning unexpected.²⁰¹

The New County court's conclusion was also aided by an examination of the pollution exclusion clause's drafting history. The court concluded that the proper focus of the debate was not on whether the pollution damage was sudden and accidental, but whether the polluting activity or discharge was unexpected and unintended.²⁰²

E. ANALYSIS

The appropriate starting point for an analysis of the scope of the pollution exclusion clause is the recognition that the pollution exclusion, like any other exclusion, is intended to exclude coverage for acts that are otherwise insured.²⁰³ In other words, there must first be a finding of an "occurrence," in order for coverage to be available. If there is no "occurrence" within the meaning of the policy terms, it is unnecessary to reach the question of whether the

pollution exclusion clause applies.²⁰⁴

"Occurrence" in the CGL policy is defined as "an accident, including injurious exposure to conditions, which results during the policy period in bodily injury or property damage neither expected nor intended from the standpoint of the insured."²⁰⁵

Once it is determined that there has been a polluting "occurrence," the pollution exclusion clause comes into play. The clause first generally excludes coverage for "property damage arising out of" a polluting occurrence. The exclusion clause then provides an exception: that the exclusion "does not apply if such discharge, dispersal, release or escape is sudden and accidental."²⁰⁶ Thus the focus of the exclusion's exception shifts from pollution damage, which is generally excluded, to the polluting activity or discharge giving rise to the damage or injury.²⁰⁷ If the activity is "sudden and accidental," the exception kicks in to reinstate coverage. Alternatively, if the discharge was intentional or reckless, coverage is precluded.

As a result of the use of the phrase "sudden and accidental" to modify the polluting activity, the entire exclusion clause becomes ambiguous. The phrase "sudden and accidental" is not defined, and is capable of at least two differing interpretations. On the one hand, the words can have a temporal meaning, as an instantaneous event. The phrase can also mean simply that the pollution discharge or dispersal was unexpected.

The exclusion clause's ambiguity is so patent that even members of the insurance industry are on record as being confused over the meaning of the phrase.²⁰⁸ Some commentators speculate that the choice of words was purposeful; that "[v]iewed in the light of the pollution programs existing in the early 1970's and the state of relevant case law, the insurance industry's choice of the terms 'sudden and accidental' suggest a calculated effort to assure ambiguity."²⁰⁹ The Environmental Protection Agency also suggests that the insurance industry knew of the exclusion clause's ambiguity when it was drafted.²¹⁰

Understanding the meaning of the pollution exclusion clause is not possible without an analysis of the historical context and the policy drafters' intent. The insurance industry has not readily made available its committee meeting minutes, reports, and analyses, which would shed light on the ambiguity.²¹¹ However, those drafting history documents which are available indicate that the pollution exclusion clause was drafted because of the perceived need to clarify the definition of "occurrence" as it relates to the insured's intent.²¹²

For example, in a letter of explanation to its members, the MIRB wrote: "The above exclusion clarifies this [pollution coverage] situation so as to avoid any question of intent. Coverage is continued for pollution or contamination[-]caused injuries when the pollution or contamination results from an accident"²¹³ The term "accident" refers back to the definition of "occurrence" in the 1966 CGL policy, in which accident includes "continuous or repeated exposure to conditions, resulting in property damage or

bodily injury neither expected nor intended from the standpoint of the insured."²¹⁴

A leading insurance company's published statements also stressed intent and the need to clarify the existing coverage. An Aetna Life and Casualty Insurance Company representative stated:

We believe that loss, injury or damage due to uncontrolled or inadequately controlled emissions or pollutants is an uninsurable business risk, since most managements are well aware of [pollution] problems and have made decisions to continue operations. We have never intended that liability insurance policies should cover injury or damage which might be "expected or intended" by the insured. However, to make absolutely certain that policy coverage was understood, specific endorsements were developed to clarify such coverage intent as regards pollution²¹⁵

Statements by insurance industry representatives to insurance commissioners and state insurance

regulatory agencies, during the process of obtaining approval for the new exclusion, are another important source for determining the meaning and intent of the clause.²¹⁶ These representations consistently support the explanation that the pollution exclusion was added merely to clarify existing coverage under the "neither expected nor intended" language in the definition of "occurrence."²¹⁷

Thus it seems clear that the insurance industry had two focuses when it introduced the 1973 pollution exclusion clause. First, it intended that coverage would be denied for reckless as well as willful polluters. The industry did not want courts to interpret the CGL policy as providing coverage for polluters who did not specifically intend to do the damage but who knew that their polluting activities would cause the damage and failed to take reasonable steps to prevent it.²¹⁸

Second, the use of the phrase "sudden and accidental" in the pollution exclusion clause was meant only to clarify the words "unintended and unexpected"

in the original policy. As such, the primary meaning of the word "sudden" is not, as the industry now argues, instantaneous or immediate. Rather, its intended connotation is "unexpected."

Despite their prior statements to the contrary and the lack of support for any other interpretation, insurers have reacted with a concerted effort to disclaim coverage for pollution damage, arguing that the phrase "sudden and accidental" limits coverage to instantaneous mishaps.²¹⁹ Thus the industry has developed the position that when it included the phrase "sudden and accidental" in the pollution exclusion clause, it intended that the term "sudden" be given a temporal meaning.²²⁰

The insurance industry's present arguments, however, are specious in light of the use of the phrase "sudden and accidental" in insurance contracts for the past several decades. Long before the industry included it in the standard pollution exclusion clause, the phrase "sudden and accidental" was used to define the scope of coverage in machinery and boiler

policies.²²¹ In interpreting the phrase, courts were unanimous in concluding that "sudden" was synonymous with "unexpected and unforeseen," and did not bear a temporal connotation.²²² Thus, when industry representatives met to draft the 1970/1973 pollution exclusion, they knew well the precise connotation of the phrase "sudden and accidental."

The industry's published representations and drafting documents are clear. The industry stated repeatedly that the "sudden and accidental" language was merely intended to clarify the phrase "neither expected nor intended from the standpoint of the accused." Moreover, virtually every court that has specifically examined and addressed the drafting history of the pollution exclusion clause has held in favor of the insured.²²³ While the issue is far from settled, the growing number of courts now willing to consider the industry's intent in drafting the clause indicates that the trend may prove favorable for policyholders.

VI. JUDICIAL INTERPRETATION OF THE "AS DAMAGES" CLAUSE

A. GENERAL

The second insurance coverage issue that has been heavily litigated in the past two decades is whether the insured has incurred "damages" that are covered by the CGL policy. The typical CGL policy provides, in pertinent part, that

"[t]he insurer will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies, caused by an occurrence, and [the insurer] shall have the right and duty to defend any suit against the insured seeking damages on account of such . . . property damage, even if any of the allegations of the suit are groundless, false or fraudulent."²²⁴

Property damage is defined as "physical injury to or destruction of tangible property which occurs during the policy period."²²⁵ If the court finds that property

damage has occurred, then the court must determine whether the policy covers any "damages" incurred by the policyholder.

It follows, then, that in the context of litigating over the scope of an insurance policy, the pivotal issue is whether the contractor's CERCLA costs constitute damages covered by the CGL policy.

CERCLA gives the government several tools with which to protect the environment and clean up hazardous waste. CERCLA section 107(a)(4) establishes liability for:

- (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;
- (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and
- (C) damages for injury to, destruction of, or

loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.²²⁶

In addition, pursuant to its broad powers under CERCLA section 106(a), the government may, in response to an actual or threatened release of a hazardous substance, seek equitable relief through an order or injunction directing one or more PRPs to remedy the environmental damage.²²⁷

Given the EPA's broad powers to either incur costs itself and seek reimbursement or to seek equitable relief, insurers often dispute coverage for response costs. In doing so, the industry has generally relied on three related arguments: (1) that there has been no property damage within the meaning of the CGL policy; (2) that the policies do not cover prophylactic actions, that is, measures taken to prevent threatened releases, and, most frequently cited (3) that suits for equitable relief do not constitute suits for "damages."²²⁸

B. PROPERTY DAMAGE AS DEFINED IN CGL POLICY

The standard CGL policy defines property damage as "physical injury to or destruction of tangible property which occurs during the policy period."²²⁹ Insurers litigating environmental coverage disputes have on occasion argued that governmental cost recovery actions for soil, air and water contamination do not constitute claims for "physical injury to or destruction of tangible property," but are merely claims for economic injury.²³⁰ That argument has been generally unsuccessful.²³¹

Mraz v. Canadian Universal Insurance Co., Ltd.,²³² however, represents a success for the insurance industry. The case involved massive amounts of gradually leaking chemical wastes at a disposal site, which, after the disposal company refused to take action, required an EPA cleanup. The government subsequently sued the disposal company for their cleanup costs, alleging environmental damage to the surrounding area.²³³

The Fourth Circuit, applying Maryland insurance law, held that the government had not sought recovery for damage to natural resources as described under CERCLA. Examining CERCLA's liability provisions,²³⁴ the court determined that "natural resources" are limited to resources "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . , any state or local government, or any foreign government."²³⁵

The court further reasoned that, although the complaint alleged that property damage had occurred, the disposal company did not allege that they themselves had suffered property damage. Instead, they only alleged response costs for the site cleanup which, the court noted, is independent from property damage.²³⁶ Citing no case authority for support, the court held that response costs are an economic loss that cannot be equated with injury to or destruction of tangible property.²³⁷

In contrast to Mraz is the decision of a panel of

the Eighth Circuit in Continental Insurance Companies v. Northeastern Pharmaceutical and Chemical Co.

(NEPACCO I).²³⁸ In NEPACCO I, the panel examined the issue of whether damage to the environment constituted "property damage" within the meaning of the CGL policy. The panel concluded that, in addition to the actual owners of the polluted land, water, or air, the federal and state governments also suffered property damage because of their quasi-sovereign "interest [in natural resources] independent of and behind the titles of its citizens in all the earth and air within [their] domain."²³⁹

Having found covered property damage, the panel then reviewed the statutory policy and language, concluding that cleanup costs under CERCLA are compensatory damages for property damage within the meaning of the CGL policy.²⁴⁰

C. EQUITABLE RELIEF AND PREVENTIVE MEASURES AS DAMAGES

By far the most litigated issues involving damages has centered on whether suits for equitable relief such

as injunctions or cleanup orders, or prophylactic measures designed to prevent future releases, constitute legal damages. In such cases, courts have split over the meaning to be given the term "as damages." Some courts have found that the phrase is an unambiguous term of art in the insurance context that obligates insurers to pay only legal damages.²⁴¹ Under this analysis, CERCLA response costs are not covered. Other courts have held that the phrase is open to interpretation, and if the law of the applicable state requires a layperson's reading, CERCLA response costs are recoverable.²⁴²

In addressing the scope of the "as damages" clause, courts claim that they base their decisions on applicable state law. However, courts interpreting the same state's law have reached different results.²⁴³

Insurers generally argue that environmental restitution represents a different amount than damages. In fact, contends the insurance industry, it may cost far more to restore the environmental status quo than to pay for actual property loss or damage.²⁴⁴ A second

argument insurers employ is that for the industry to bargain to cover preventive measures would encourage inefficient overutilization of insurance coverage, which could eventually impact on the entire market.²⁴⁵

Until the recent past, insurers have been generally successful with this line of argument. Courts have traditionally held that injunctive relief or restitution are not covered damages under the CGL policy.²⁴⁶ The courts reasoned that a lawsuit seeking injunctive relief against the insured is not covered because it does not seek compensatory damages.²⁴⁷

For example, the Third Circuit in a 1982 CGL case explained that damages are "awarded as a form of substitutional redress. . . They are intended to compensate a party for an injury suffered or other loss."²⁴⁸ Courts have found this concept of damages as substitutional redress is distinct from equitable relief.²⁴⁹ Courts have also held that response costs are not damages because they are "merely part of the cost of doing business."²⁵⁰

Two federal circuit courts -- the Fourth and Eighth Circuits -- have relied on this distinction in finding that CERCLA response costs do not constitute damages under the CGL policy. In Maryland Casualty Company v. Armco²⁵¹ the underlying suit was a claim by the federal government against Armco for reimbursement and injunctive relief because of contamination at a Missouri hazardous waste site. Armco's insurer sought a declaratory judgment concerning its liability.²⁵²

The unanimous Fourth Circuit, applying Maryland law, held that legal damages, as distinguished from claims for injunctive or restitutionary relief, include only payments to third persons for actual, tangible injury.²⁵³ The court reasoned that to give damages a broader interpretation would render the phrase "as damages" in the CGL policy mere surplusage, giving rise to a duty to pay any form of obligation.²⁵⁴

The Fourth Circuit further contended that insurers are reluctant to cover what are essentially prophylactic measures which are subject to the discretion of the insured and not connected with any

specific harm.²⁵⁵ In reaching its conclusion, the court did not even address the CERCLA statutory language.

Perhaps the most significant case holding that clean-up costs are not legal damages is Continental Insurance Company v. Northeastern Pharmaceutical & Chemical Company (NEPACCO.)²⁵⁶ In 1971 NEPACCO arranged to have 85 drums of highly toxic chemical wastes, including dioxin, dumped in a trench on a farm in rural Missouri. Many of the drums were in a deteriorated condition at the time of disposal, breaking open when they were dumped. In the next three years NEPACCO also disposed of more hazardous wastes, all of which resulted in personal injury and property damage.²⁵⁷

In an EPA investigation of the disposal site, high concentrations of dioxin and other toxic chemicals were found. The EPA cleaned up the site and sought abatement costs under the Resource Conservation and Recovery Act (RCRA)²⁵⁸ and injunctive relief and reimbursement of response costs under CERCLA.²⁵⁹ The district court held NEPACCO and others jointly and severally, strictly liable for the CERCLA cleanup

costs. On appeal, a panel of the Fourth Circuit in NEPACCO I held that the cleanup costs under CERCLA are compensatory damages within the meaning of the CGL clause.²⁶⁰ NEPACCO II, the en banc hearing, was the result of NEPACCO's insurer seeking a declaratory judgment concerning its liability.

The two NEPACCO decisions diverged in their approach to the "as damages" issue, yielding differing results. The panel in NEPACCO I first began with a determination that covered property damage had been sustained.²⁶¹ Finding property damage within the meaning of the CGL policy, the panel in NEPACCO I then rejected the insurance industry's argument that even if environmental contamination had caused property damage, CERCLA cleanup costs were not recoverable as damages.²⁶² The panel reviewed the statutory policy and language, concluding that cleanup costs under CERCLA are compensatory damages for property damage within the meaning of the CGL policy.²⁶³

The en banc panel followed the Fourth Circuit's lead in holding that under Missouri law the term

"damages" is not ambiguous in the insurance context and refers only to legal damages, not clean-up costs.²⁶⁴ Analyzing "damages" strictly in the insurance context, the court contended that black letter insurance law provides that claims for equitable relief do not constitute claims for damages under liability contracts.²⁶⁵ Citing Maryland Casualty, the court reasoned that the insurer did not agree to pay all sums that the insured is legally obligated to pay, but rather, only sums the insured is obligated to pay as damages.²⁶⁶

The NEPACCO II court also addressed the issue of prophylactic measures, finding that, from the insurance company's viewpoint, EPA's investigative and remedial actions constitute merely safety measures. Through these measures, contended the court, the government is hoping to stop the future spread of contamination, rather than repair or clean up present damage.²⁶⁷

The Fourth and Eighth Circuits' reasoning has been followed in many cases.²⁶⁸ On the other hand, many courts have begun to question the distinction between

the costs of an injunction or restitution to a government agency and paying damages to third parties to compensate for property damage. Accordingly, since NEPACCO II and Maryland Casualty, there has been a rash of decisions holding for policyholders.²⁶⁹

Successful insureds have urged that the plain meaning of the word "damages" controls under the applicable state law, and the plain meaning encompasses equitable relief such as restitutions and injunctions.²⁷⁰ The Second Circuit, for example, had little difficulty in so finding in Avondale Industries, Inc. v. Travelers Indemnity Co.²⁷¹ Avondale involved property damage and personal injury from salvage oils and chemical wastes seeping from an oil recycling facility. Avondale, a builder and repairer of ships and customer of the recycling facility, was identified as a PRP and ordered by the state to take remedial action or pay the state's response costs.²⁷²

Avondale's insurers cited Maryland Casualty and NEPACCO II, arguing the distinction between legal damages and equitable response costs. The Second

Circuit refused to follow the Fourth and Eighth Circuit's logic. The court, applying New York law, found that insurance policy terms are to be accorded their "natural and reasonable meaning," corresponding to the reasonable expectations and purposes of ordinary businessmen. If uncertainty remains, the terms must be construed to embrace coverage.²⁷³

The court determined that an ordinary businessman reading the policy would have believed himself covered "for the demands and potential damage claim" the state asserted.²⁷⁴ The court reasoned that if the insurer drafting the policy wanted otherwise, it must do so in clear and unambiguous language. As the term "damages" was not defined in the CGL policy, it must be construed to favor the policyholder.²⁷⁵

A 1991 Third Circuit case also rejects the legal/equitable distinction of NEPACCO II. Federal Insurance Co. v. Susquehanna Broadcasting Co.²⁷⁶ involved an EPA order under CERCLA section 107(a)²⁷⁷ to clean up soil and water contamination resulting from a waste hauling and disposal business. The plaintiff's

insurer relied primarily on NEPACCO and Maryland Casualty in arguing that it should not have to cover CERCLA response costs.²⁷⁸

Although the Third Circuit acknowledged that its analysis was not very different from the en banc discussion in NEPACCO II, it reached a different result. The court, applying Pennsylvania law interpreting insurance contracts, noted that words of common usage will be construed in their natural, plain and ordinary sense. Technical words, however, will be construed in their technical sense unless a contrary intention appears.²⁷⁹ The court interpreted "damages" in this context in its technical sense, as it is generally recognized in the law, concluding that the term does not include equitable relief.²⁸⁰

Not satisfied with this finding, however, the court noted that to recognize that damages does not include equitable relief does not answer the specific question of whether the costs of restoring land to its original condition are, nevertheless, recoverable as damages. Examining Pennsylvania precedent, the court

went on to determine that costs of restoring and cleaning up property are, under Pennsylvania law, recoverable in damages.²⁸¹

D. ANALYSIS AND TREND

The analysis in NEPACCO II contains an essential flaw. The court initially recognized that under applicable state law, terms in insurance contracts are to be given a layperson's, or normal meaning. If the language is unambiguous, the policy must be enforced according to the language, but if ambiguous, it will be construed against the insurer.²⁸² Nevertheless, the court proceeded to adopt a technical meaning of the term "damages" as it is used in black letter insurance law.²⁸³ Placing the term in the insurance context, the court had no difficulty in finding it unambiguous.

A recent D.C. Circuit case recognized the Eighth Circuits' flawed reasoning regarding interpretation of the term "damages." In Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.,²⁸⁴ a case arising out of the same facts as the NEPACCO litigation²⁸⁵, the court

sharply rejected the en banc Eighth Circuit's holding.

Finding Missouri law unsettled because the state's appellate courts had not addressed the damages issue, the court refused to give deference to the Eighth Circuit's application of Missouri law. Missouri law requires that insurance policy language is to be given the meaning that would ordinarily be understood by the layperson who bought the policy.²⁸⁶ The D.C. Circuit noted that rather than relying on the common understanding of the word "damages," as the NEPACCO II court said it would, the Eighth Circuit instead analyzed the term as it would be used by "astute insurance specialists or perspicacious counsel."²⁸⁷

After determining that the term "damages" should be construed in layperson's terms, the court went on to thoroughly analyze Missouri law concerning whether the term includes the costs of restoring or repairing property.²⁸⁸ The D.C. court concluded that liability for environmental cleanup costs "quite naturally fits this common and ordinary understanding of damages."²⁸⁹

Thus Independent Petrochemical significantly limits the future precedential value of NEPACCO II. Because of the Eighth Circuit's reliance on the Fourth Circuit's analysis, Maryland Casualty's continued validity is likewise questionable. The D.C. Circuit's analysis is persuasive, particularly in light of the number of cases and other sources of support the court examined. Courts taking a similarly thorough approach in addressing the issue of damages should have little difficulty in seeing and rejecting the essential weakness of the previous two decisions.

The distinction between, on the one hand, complying with a cleanup order or making restitutionary payments to the government and, on the other hand, payment of damages to third persons for the same property damage is artificial and strained. After all, is it not merely fortuitous that the insured is required to pay court-mandated cleanup costs instead of court-ordered damages for specific loss or injury? Both involve "compensation or satisfaction imposed by law for a wrong or injury caused by violation of a

legal right."²⁹⁰

The artificial distinction only serves as a disincentive for policyholders to cooperate with the state or federal government in cleaning up a site.²⁹¹ Furthermore, addressing the damages issue in a vacuum that ignores consideration of CERCLA's statutory scheme defeats the federal statute's environmental goals of hazardous waste cleanup.

With the exception of NEPACCO II and its progeny, in virtually every case in which the applicable state's rules of construction require application of the common and ordinary, layperson's understanding, the word "damages" has been construed to cover reimbursement for environmental response costs.²⁹² Courts that reject blind deference to precedent and conduct a meaningful examination of the law should reach the same conclusion.

A recent Supreme Court decision should ensure that appeals courts take a closer look at district court's determination of state law, rather than simply

deferring to the district court's analysis. In Parker Solvents Co. v. Royal Insurance Cos. of America,²⁹³ the Supreme Court vacated an Eighth Circuit ruling that affirmed a pro-insurer ruling by the lower court.²⁹⁴

In addressing the issue of whether CERCLA cleanup costs are covered damages, the district court had relied on NEPACCO II, finding Arkansas law to be similar to Missouri law in interpreting insurance clauses. The Eighth Circuit then affirmed the district court ruling, stating that it gave great weight to decisions of district court judges on questions of law.²⁹⁵

The Supreme Court, however, had recently ruled in an unrelated case that an appeals court should take a fresh look at a district court's determination of state law in diversity cases, rather than simply deferring to the district court's analysis.²⁹⁶ Based on this recent ruling, the Supreme Court granted the policyholder's motion for vacation of the pro-insurer ruling.

The recent Supreme Court pronouncement should

provide support for policyholders seeking to avoid undue deference to decisions like NEPACCO II and its progeny.

VII. PRACTICAL CONSIDERATIONS

Faced with the tremendous costs for environmental restoration of military installations and facilities, the Defense Department has great incentive to pursue indemnification from defense contractors' insurers. Military officials contemplating litigation will have several practical considerations to face before making such a decision. The first is, of course, the possible recovery for the agency if litigation is successful.

The first step in evaluating the possible recovery is to locate all of the policies the insured maintained during the period in which releases or discharges of waste are alleged.²⁹⁷ As property damage from hazardous wastes can go undetected for years, it can be difficult to go back in time and locate long-dormant policies.²⁹⁸ It is also not unusual in the case of large-scale government contractor operations for the contractor to

have held several different policies during the relevant timeframe. Each should be located and examined as a potential basis for recovery.

Next, the amount of coverage the CGL policy provides must be determined. For policies issued prior to 1966, the policy limits are on a "per accident" basis.²⁹⁹ After 1966, coverage is based on "occurrences."³⁰⁰ A close examination of the polluting activities is necessary to determine if they fall within the policy's definition of accident or occurrence.³⁰¹ Cases of gradual, long-standing and undetected pollution raise the issue of whether there was only one covered occurrence, or whether the activity can be separated into distinct occurrences, thereby increasing the potential recovery.

It should next be determined if any policy exclusions may apply to preclude recovery. The most common are the exclusion for property damage to property owned or occupied by or rented to the insured contractor, or property in the contractor's care, custody or control,³⁰² and the pollution exclusion

clause introduced in 1970-1973.³⁰³ As discussed in detail in Part V, above, the scope and applicability of the pollution exclusion clause is unsettled. What is clear, however, is that if the court hearing the issue is presented with the substantial amount of available evidence showing the intent of the insurance industry at the time the exclusion was adopted, it is virtually certain that the court's construction of the terms will favor the insured.³⁰⁴

Balanced against the potential recovery from the insurer is the potential cost of the litigation, both in terms of dollars and in time. Litigation in this area can be complex, particularly if there are multiple PRPs or if a PRP has more than one insurer. For example, in a lawsuit by the federal government against Shell Oil for environmental damages in Colorado and California, the policyholder has impleaded almost 300 current and former insurers as possible indemnifiers.³⁰⁵ The stakes in this arena are high: an insurance industry representative testifying before the Senate estimated that litigation costs under Superfund can equal twenty-four to forty-four percent of direct

cleanup costs.³⁰⁶

Finally, military officials considering pursuing an insurance coverage case should consider the appropriate forum for the litigation, to the extent that a choice of forums is possible. As the discussion in Part VI above indicates, this is particularly critical in cases involving the issue of whether "damages" within the meaning of the CGL policy were incurred. Those courts finding that under applicable state law, the term "damages" must be accorded a normal, layperson's interpretation are likely to find in favor of coverage.³⁰⁷ Those courts, however, finding that state law requires a technical reading in the insurance context will normally deny coverage.³⁰⁸

VIII. CONCLUSION

Whether to pursue contractors' insurers for indemnification of environmental cleanup costs is not an easy decision. In addition to the practical matters that must be considered, the likelihood of success must be weighed. The current patchwork pattern of

inconsistent decisions renders predictions difficult. Recent court holdings, however, indicate that in examining the pollution exclusion clause, courts are beginning to explore the drafting history and industry representations. Courts following the insurance industry's intentions as manifested in the drafting documents are giving a clear and consistent meaning to the pollution exclusion clause.

Likewise, on the issue of whether Superfund response costs constitute damages, a number of courts have recently refused to give blind deference to artificial distinctions. Courts that undertake an aggressive scrutiny of the applicable state's law are more often finding in favor of coverage. Although the issues are too complex and the precedents too well-entrenched to be quickly overlooked, the recent trends are encouraging.

APPENDIX A

SURVEY BY JURISDICTION OF CASES CONSTRUING THE POLLUTION EXCLUSION CLAUSE

| <u>STATE</u> | <u>FINDING FOR INSURED</u> | <u>FINDING FOR INSURER</u> | <u>CITATION</u> |
|--------------|------------------------------------|------------------------------------|---|
| Alabama | | x | Hicks v. American Resources Ins. Co., Inc., No. 87- 1548 (Ala. Apr. 28, 1989) |
| | x | | Molton Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co., 347 So. 2d 95 (Ala. 1977) |
| California | | x | Shell Oil Co. v. Accident & Casualty Ins. Co., No. 278953 (San Mateo Country Sup. Ct. July 13, 1988) |
| | x | | Pepper Indus., Inc. v. Home Ins. Co., 67 Cal. App. 3d 1012, 134 Cal. Rptr. 904 (1977) |
| Colorado | x | | United States Fidelity & Guar. Co. v. Colorado Nat'l Bank, No. 86-Z-1033 (D. Colo. Nov. 4, 1988) |
| | x | | Broderick Inv. Co. v. Hartford Accident & Indem. Co., No. 86-Z-1033 (D. |

| | | |
|----------|---|---|
| | | Colo. Oct. 4, 1989) |
| Delaware | x | New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162 (3d Cir. 1991) |
| Florida | x | Industrial Indem. Ins. Co. v. Crown Auto Dealerships, Inc., 731 F. Supp. 1517 (M.D. Fla. 1990) |
| | x | W.C. Hayes, Jr. v. Maryland Casualty Co., 688 F. Supp. 1513 (N.D. Fla. 1988) |
| | x | Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co., 668 F. Supp. 1541 (S.D. Fla 1987) |
| | x | Payne v. United States Fidelity & Guar. Co., 625 F. Supp. 1189 (S.D. Fla. 1985) |
| Georgia | x | Claussen v. Aetna Casualty & Sur. Co., 676 F. Supp. 1571 (S.D. Ga. 1987), ***how to cite?*** |
| Illinois | x | United States Fidelity & Guar. Co. v. Specialty Coatings Co., 180 Ill. App. 3d 378, 535 N.E.2d 1971 (1989), <u>review denied</u> , No. 68605 (Ill. Oct. 5, 1989) |
| | x | Reliance Ins. Co. v. Martin, 126 Ill. App. 3d 94, 467 N.E.2d 287 (1984), <u>cert. denied</u> , 163 Ill. App. 3d 549 (1987) |
| Indiana | x | Barmet of Indiana, Inc. v. |

| | | |
|---------------|---|---|
| | | Security Ins. Group, 425 N.E.2d 201 (Ind. Ct. App. 1981) |
| Kansas | x | United States Fidelity & Guar. Co. v. Morrison Grain Co., 734 F. Supp. 437 (D. Kan. 1990) |
| | x | American Motorists Ins. Co. v. General Host Corp., 667 F. Supp. 1423 (D. Kan. 1987) |
| Kentucky | x | United States Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31 (6th Cir. 1988) |
| Maine | x | Guilford Indus., Inc. v. Liberty Mut. Ins. Co., 688 F. Supp. 792 (D. ME. 1988) |
| Maryland | x | Bentz v. Mutual Fire, Marine, & Inland Ins. Co., 575 A.2d 795 (Md. Ct. Spec. App. 1990) |
| Massachusetts | x | Travelers Ins. Co. v. Waltham Indus. Laboratories Corp., No. 87-0760-MA (1st Cir. Aug. 18, 1989) |
| | x | Covenant Ins. Co. v. Friday Engineering, Inc., 742 F. Supp. 708 (D. Mass 1990) |
| | x | Lumberman's Mut. Casualty Co. v. Bellville Indus., Inc., 407 mass. 675, 555 N.E.2d 568 (1990) |
| | x | C.K. Smith & Co. v. American Empire Surplus Lines, Ins. Co., No. 85- 32950 (Mass. Super. Ct. |

Sept. 27, 1989)

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| | x | Shapiro v. Public Service Mut. Ins. Co., 19 Mass. App. 648, 477 N.E.2d 146 (1985) |
| Michagan | x | Grant-Southern Iron & Metal Co. v. CNA Ins. Co., 905 F.2d 954 (6th Cir. 1990) |
| | x | F.L. Aerospace v. Aetna Casualty & Sur. Co., 897 F.2d 214 (6th Cir. 1990) |
| | x | United States Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31 (6th Cir. 1988) |
| | x | Detrex Chem. Indus., Inc. v. Employers Ins. of Wausau, 746 F. Supp. 1310 (N.D. Ohio 1990) |
| | x | Du-Wel Prod., Inc. v. United States Fire Ins. Co., 236 N.J. Super. 349, 565 A.2d 1113 (1989) |
| | x | United States Fidelity & Guar. Co. v. Thomas Solvent Co., 683 F. Supp. 1139 (W.D. Mich. 1988) |
| | x | Jonesville Prod., Inc. v. Transamerica Ins. Group, 156 Mich. App. 508, 402 N.W.2d 46 (1986) |
| | x | Upjohn Co. v. New Hampshire Ins. Co., 178 Mich. App. 706, 444 N.W.2d 813 (1989) |
| Minnesota | x | Grinnel Mut. Reinsurance Co. v. Wasmuth, 432 N.W.2d |

| | | |
|---------------|---|--|
| | | 495 (Minn. App. 1988) |
| Missouri | x | United States v. Conservation Chemical Co., 653 F. Supp. 152 (W.D. Mo. 1986) |
| Montana | x | General Ins. Co. v. Town Pump, Inc., 214 Mont. 27, 692 P.2d 427 (1984) |
| New Hampshire | x | Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30 (1st Cir. 1984) |
| New Jersey | x | Diamond Shamrock Chem. Co. v. Aetna Casualty & Sur. Co., No. C-3939-84 (N.J. Super. Ct. Chan. Div. Apr. 12, 1989) |
| | x | Summit Associates, Inc. v. Liberty Mut. Fire Ins. Co., 229 N.J. Super. 56, 550 A.2d 1235 (App. Div. 1988) |
| | x | Broadwell Realty Services, Inc. v. Fidelity & Casualty Co., 218 N.J. Super. 516, 528 A.2d 76 (App. Div. 1987) |
| | x | Jackson Township Mun. Util. Auth. v. Hartford Accident & Indem. Co., 186 N.J. Super. 156, 451 A.2d 990 (Law Div. 1982) |
| New York | x | EAD Metallurgical, Inc. v. Aetna Casualty & Sur. Co., 905 F.2d 8 (2d Cir. 1990) |
| | x | Avondale Indus., Inc. v. Travelers Indem. Co., 887 F.2d 1200 (2d Cir. 1989) |

x Amro Realty Corp. v. Zurich
Ins. Co., 745 F. Supp. 832
(N.D.N.Y. 1990)

APPENDIX B

SURVEY BY JURISDICTION OF CASES ADDRESSING
ISSUE OF WHETHER CERCLA RESPONSE COSTS
ARE DAMAGES WITHIN THE MEANING OF CGL POLICY

| <u>STATE</u> | <u>MAY BE COVERED</u> | <u>NOT COVERED</u> | <u>CITATION</u> |
|--------------|---------------------------|------------------------|-----------------|
|--------------|---------------------------|------------------------|-----------------|

Arkansas

FOOTNOTES

1. Address by Secretary of Defense Dick Cheney to a national environmental conference, Sep. 4, 1990, quoted in Dianne Dumanoski, Pentagon Takes First Steps Toward Tackling Pollution, Boston Globe, Sept. 9, 1990, at 79.
2. Keith Schnieder, Military Has New Strategic Goal in Cleanup of Vast Toxic Waste, N.Y. Times, Aug. 5, 1991, at A1.
3. Id.
4. Helaine Olen, Huge Military Toxic Cleanup Fund Urged, L.A. Times, Mar. 14, 1992, at A34.
5. Schneider, supra note 2, at A1. The article's author notes that at a potential cost of \$400 billion, the military's environmental cleanup program would be four times as expensive as the Mercury, Gemini and Apollo space programs combined, and cost \$100 billion more than the building of the interstate highway system.

6. Roger N. Boyd, Ridgway M. Hall, Jr., and Nancy S. Bryson, Who Pays for Superfund Cleanups at DOD-Owned Sites?, 2 A.B.A. Nat. Resources Env't. 11, 12 (Spring 1986) [hereinafter Boyd].

7. United States Environmental Protection Agency, Office of Federal Activities, Federal Facilities Compliance Strategy, Appendix A-18 (Nov. 1988), cited in Mark J. Connor, Government Owned-Contractor Operated Munitions Facilities: Are They Appropriate in the Age of Strict Environmental Compliance and Liability?, 131 Mil. L. Rev. 1, 18 n.110 (1991).

8. 137 Cong. Rec. S14966-01 (1991) (statement of Sen. Baccus). The NPL, mandated by CERCLA section 106, 42 U.S.C. § 9605(a)(8)(B) (1988), is a listing of sites nationwide that the EPA deems present the greatest threat to public health and welfare or to the environment.

9. 42 U.S.C. §§ 9601-9675 (1988) (amended 1991).

10. See infra Part II.B.

11. Boyd, supra note 6, at 12. See also infra Part II.A.
12. See infra Part II.C.
13. See infra Part II.C.
14. See infra Part III.B.
15. Id.
16. David E. Hoskins, Striking a Balance: A Proposal for Interpreting the Pollution Exclusion Clause in Comprehensive General Liability Insurance Policies, 19 Env'tl. L. Rep. 10351, 10351 (Aug. 1989).
17. See Peter E. Hapke, Federal Circuit Court Insurance Decisions Contaminate Superfund Policy, 19 Env'tl. L. Rep. 10393, 10393 (Sept. 1989).
18. Pub. L. No. 99-499, 100 Stat. 1614 (codified at 10 U.S.C. §§ 2701-2710 and 26 U.S.C. § 9507 (1988)).
19. 42 U.S.C. § 9606 (1988).
20. 42 U.S.C. §9607(a)(4)(A) (1988). Money for CERCLA remedial actions generally comes from the Hazardous

Substance Superfund (Superfund). 26 U.S.C. §9507 (1988).

21. 42 U.S.C. §9607(a)(4) (1988).

22. 42 U.S.C. §9606(a) (1988).

23. The statute defines "person" to include states.
Id. § 9601(21).

24. Id. § 9659(a)(1).

25. The citizen suit provision is not available if the EPA has begun and is diligently prosecuting an action under CERCLA that would, if successful, compel compliance and remedy the injury that is the subject of the complaint. Id. § 9659(d)(2).

26. 42 U.S.C. § 9607(a)(1)-(4) (1988).

27. 42 U.S.C. § 9620 (1988). Unlike generic EPA cleanup actions which are paid from Superfund, cleanup of DOD facilities is funded by the Defense Environmental Restoration Account (DERA). 10 U.S.C. § 2703 (1988).

28. 42 U.S.C. § 9607(a) (1988).

29. See Margaret O. Steinbeck, Liability of Defense Contractors for Hazardous Waste Cleanup Costs, 125 Mil. L. Rev. 55, 58-59 (citing United States v. Bliss, 667 F. Supp. 1298, 1306 (E.D. Mo. 1987); Jones v. Inmont Corp., 584 F. Supp. 1425, 1428-29 (S.D. Ohio 1984); United States v. Northeastern Pharmaceutical & Chem. Co., Inc., 579 F. Supp. 823, 847 (D. Mo. 1984)).

30. 42 U.S.C. § 9607(a)(4) (1988).

31. 42 U.S.C. § 9601(3) (1988). The statute's definition of liability refers to the standard of liability found in the "Oil and Hazardous Substance Liability" section of the Clean Water Act (CWA), 33 U.S.C. §1321 (1988). Courts have consistently construed the CWA's §1321 as applying a strict liability standard. Consistent with these rulings and CERCLA's legislative history, courts also construe CERCLA's standard as one of strict liability. See, e.g., New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985); United States v. N.E. Pharmaceutial and Chemical Co., 579 F. Supp. 823, 843-

44 (W.D. Mo. 1984); City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135 (Pa. D & C.4th (1982)).

32. See J.V. Peters & Co. v. Administrator, EPA, 767 F.2d 263, 265-66 (6th Cir. 1985); New York v. Shore Realty Corp., 759 F.2d 1032, 1043-44 (2d Cir. 1985).

33. Courts have refuted claims of unconstitutionality of CERCLA's retroactive liability scheme in two ways. Under the first theory, courts find that liability is contingent on a release that is a present condition or effect of a past disposal act. Even if considered retroactive, such liability bears a rational relationship to the government's legitimate goal of cleaning up the environment at the polluters' expense. See Katherine T. Eubank, Note: Paying the Costs of Hazardous Waste Pollution: Why is the Insurance Industry Raising Such a Stink?, 1991 U. Ill. L. Rev. 173, 184 (citations omitted).

The second approach is that, even if the polluting activity occurred before enactment of CERCLA, the response costs were incurred after the legislation was

enacted; therefore CERCLA is not truly retroactive.

Id. (citations omitted).

34. See New York v. Shore Realty Corp., 759 F.2d 1032, 1052-53 (2d Cir. 1985); United States v. Conservation Chem. Co., 619 F. Supp. 162, 199 (W.D. Mo. 1985); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808-10 (S.D. Ohio 1983). But cf. United States v. A & F Materials Co., 578 F. Supps. 1249, 1256-57 (S.D. Ill. 1984) (court may apportion damages even if defendant cannot prove its causal contribution).

35. See, e.g., United States v. A & F Materials Co., 578 F. Supp. 1249, 1254 (S.D. Ill. 1984); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 807-08 (S.D. Ohio 1983). See also Barbara J. Gulino, A Right of Contribution Under CERCLA: The Case for Federal Common Law, 71 Cornell L. Rev. 668, 673-76 (1986).

36. E.g., United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983).

37. 42 U.S.C. § 9613(f) (1988).

38. See, e.g., United States v. New Castle County, 642 F. Supp. 1258, 1265 (D. Del. 1986).
39. 42 U.S.C. § 9613(f) (1988).
40. Id. § 9613(f)(2).
41. Id. § 9613(f)(3).
42. Id. § 9607(e)(2).
43. Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994, 1000 (D.N.J. 1988).
44. 42 U.S.C. § 9607(e)(1) (1988).
45. Boyd, supra note 6, at 13.
46. Id. at 14-15.
47. Id.
48. Id. at 15.
49. Id. at 15-16.
50. Connor, supra note 7, at 1.

51. Laurent R. Hourcle, Robert S. Lingo, Francis H. Esposito, Environmental Law in the Fourth Dimension: Issues of Responsibility and Indemnification with Government Owned-Contractor Operated Facilities, 31 A.F. L. Rev. 245, 246 (1989)
52. Id.
53. 48 C.F.R., Ch. 1 (1991).
54. Federal Acquisition Regulation 16.301-1, 31.201-2 (1 Apr. 1984) (hereinafter FAR).
55. 48 C.F.R. Ch. 2 (1990).
56. Robert K. Huffman & Willard L. Boyd, Government Contractors' Recovery of Environmental Response Costs, Environmental Risks of Government Contracts, A.B.A. Sec. Pub. Cont. L. D1, at D3 (May 18, 1990).
57. FAR 52.228-7.
58. FAR 52.228-7(c).
59. FAR 52.228-7(c).
60. Huffman & Boyd, supra note 56, at D12.

61. FAR 52.228-7(d).

62. FAR 52.228-7(e).

63. FAR 52.228-7(c).

64. More unclear is the issue of whether the Liability to Third Persons clause allows indemnification if the contractor has a comprehensive general liability (CGL) policy but the insurance company providing the policy denies coverage based on the insurer's interpretation of a pollution exclusion clause or other policy term. See infra Parts V and VI for a comprehensive discussion on the positions taken by insurance companies with regard to coverage of environmental cleanup costs under CGL policies.

65. 50 U.S.C. §§ 1431-35 (1988).

66. Id. at § 1431.

67. See S. Rep. No. 2281, 85th Cong., 2d Sess. (1958), reprinted in 1958 U.S.C.C.A.N. 4043. The Senate report makes it clear that indemnification of defense

contractors is one of the primary reasons for the Act, noting:

[T]he departments authorized to use this authority have heretofore utilized it as the basis for the making of indemnity payments under certain contracts. The need for indemnity clauses in most cases arises from the advent of nuclear power and the use of highly volatile fuels in the missile program. The magnitude of the risks involved under procurement contracts in these areas have rendered commercial insurance either unavailable or limited in coverage. At the present time, military departments have specific authority to indemnify contractors who are engaged in hazardous research and development, but this authority does not extend to production contracts (10 U.S.C. 2354). Nevertheless, production contracts may involve items, the production of which may include a substantial element of risk, giving rise to the possibility of an enormous amount of claims. It is, therefore, the position of the military departments that to the extent that commercial

insurance is unavailable, the risk of loss in such a case should be borne by the United States.

Id. at 4045.

68. FAR 50.102(a).

69. Exec. Order No. 10789, 23 F.R. 8897 (1958), as amended by Exec. Order No. 1051, 27 F.R. 9683 (1962); Exec. Order No. 11382, 32 F.R. 16247 (1967); Exec. Order No. 11610, 36 F.R. 13755 (1971); Exec. Order No. 12148, 44 F.R. 43239 (1979), reprinted in 50 U.S.C. §1431 (1988).

70. Id. Although "unusually hazardous" was not defined, the Defense Department's stated position in 1984 was that the phrase meant risks "generally . . . associated with nuclear-powered vessels, nuclear-armed guided missiles, experimental work with nuclear energy, handling of explosives, or performance in hazardous areas." Hearings on H.R. 4083, Government Contractors Product Liability Act of 1983 and H.R. 4199, Contractor Liability an Indemnification Act Before the Subcomm. on Administrative Law and Governmental Relations of the

House Judiciary Comm., 98th Cong., 2d Sess. 45 (1984) (testimony of Mary Ann Gilleece, Deputy Under Secretary of Defense for Acquisition Management) See also generally Connor, supra note 7, at 37-38.

71. See Connor, supra note 7, at 35-37.

72. Memorandum of Decision, Office of the Secretary of the Army, Subject: Authority Under Public Law 85-804 to Include an Indemnification Clause in Contracts for Lake City and Newport Army Ammunition Plants, 31 May 1985.

73. See generally Connor, supra note 7, at 37-38.

In the years following the Public Law 85-804 determinations for the Lake City and Newport Army Ammunition Plants (AAPs), the Secretary of the Army has further refined the scope of activities warranting indemnification. For example, the 1989 approval for indemnification at the Radford AAP, which is considered the model for all remaining Public Law 85-804 determinations, extended indemnification to cover use of toxic or hazardous materials in performance of contracts other than the defense munitions contract,

with written approval of the contracting officer.

Memorandum of Decision, Office of the Secretary of the Army, Subject: Authority Under 50 U.S.C. §§ 1431-1435 (Pub. L. 85-804) to Include an Indemnification Clause in a Contract With Hercules Incorporated, 30 Oct. 1989 (cited in Connor, supra note 7, at 39-40 & nn.263-65).

74. FAR 50.000 to 50.403-3.

75. FAR 50.102.

76. See Memorandum of Decision, Office of the Secretary of the Army, Subject: Authority Under 50 U.S.C. §§ 1431-1435 (Pub. L. 85-804) to Include an Indemnification Clause in a Contract With Hercules Incorporated, 30 Oct. 1989, cited in Connor, supra note 7, at 39-40 & nn.263-69.

77. A "non-sudden release" is defined as a release of toxic, nuclear, or hazardous chemicals or materials that "takes place over time and involves continuous or repeated exposure." Sudden release is a release which is not repeated or continuous in nature. Memorandum of Decision, Office of the Secretary of the Army, Subject:

Authority Under Public Law 85-804 to Include an Indemnification Clause in a Contracto for the Iowa Army Ammunition Plant, 1 Apr. 1988, quoted in Connor, supra note 7, at 39, n.262.

78. Id. 40-41 & n.267. This 1989 Secretary of the Army determination is significant in that it expands the scope of the indemnity by limiting exclusions to cases in which a non-sudden release is caused by the contractor's noncompliance with environmental laws or regulations, but only with the knowledge or intent of the contractor's principal officers. Consequently, absent a senior-level decision to knowingly violate laws or regulations, a contractor is well-protected by indemnification. See Connor, supra note 7, at 41 & nn.268-70.

79. FAR 28.306(a).

80. Id.

81. FAR 31.205-19.

82. FAR 28.307.

83. Id.

84. Army Fed. Acquisition Reg. Supp. 28.307-2(b) (1 Dec. 1984).

85. FAR 28.301(b).

86. See Sawyer, Comprehensive Liability Insurance: The Inside, Best's Fire & Casualty News at 60 (May 1941) cited in Carl A. Salisbury, Pollution Liability Insurance Coverage, The Standard-Form Pollution Exclusion, and the Insurance Industry: A Case Study in Collective Amnesia, 21 Env'tl. L. 357, 359 n.6 (1991).

87. Salisbury, supra note 86, at 361-62 (citing Hallowell v. State Farm Mut. Auto. Ins. Co., 443 A.2d 925, 926 (Del. 1982)).

88. Under the standard CGL policy the insurance carrier assumes five different duties. The first two are: (1) the duty to indemnify damages because of injury or damage covered by the policy; and (2) the duty to defend the insured in litigation when the complaint arguably falls within the policy terms. These two obligations are the focus of the bulk of insurance litigation. The insurance company is also

obligated to: (3) provide "loss control" to the policyholder, by assisting in promoting safety and reducing claims; (4) investigate claims made by the policyholder; and finally (5) provide loss mitigation costs; that is, pay expenses to mitigate losses that have already occurred and prevent further loss or damage to the insured or others. See Salisbury, supra note 86, at 359 n.6.

89. See Hapke, supra note 17, at 9.

Courts are not reluctant to find that an insurer is obligated to defend even if the duty to indemnify is questionable or appears on its face to be excluded by the policy. See, e.g., New Castle County v. Continental Casualty Co., 725 F. Supp. 800, 807 (D. Del. 1989) (insurance company has a duty to defend the policyholder in any suit seeking damages on account of property damage or bodily injury even if such suit is "groundless, false or fraudulent.")

As a result, the insured in a Superfund cost recovery action may find the insurance company paying

its defense costs, while reserving its right to indemnify for the cleanup costs, which will require additional litigation to resolve.

90. The IRB succeeded the National Bureau of Casualty Underwriters (NBCU). The bureaus were trade associations that issued revised standard provisions for CGL policies that they distributed to member insurance underwriters. The bureaus also represented members in submitting proposed revisions in standard policy language for state insurance regulatory approval. See S. Hollis M. Greenlaw, The CGL Policy and the Pollution Exclusion Clause: Using the Drafting History to Raise the Interpretation Out of the Quagmire, 23 Colum. J.L. & Soc. Probs. 233, 236-37 (1990). The distinction between the NBCU/IRB and the MIRB was that the former consisted of stock insurance companies and the latter of mutual insurance companies. Salisbury, supra note 86, at 361 n.8.

91. Salisbury, supra note 86, at 361 n.8.

92. See Hapke, supra note 17, at 8.

93. Id.

94. Richard M. Gold & Dennis L. Arfmann, The Insurance Industry and Superfund: Current Trends in Private Party and Government Cost Recovery Litigation, [Analysis & Perspective] *Toxics L. Rep. (BNA)* 347 (Aug. 14, 1991).

95. See generally Greenlaw, supra note 90, at 235-52; Thomas A. Gordon & Roger Westendorf, Liability Coverage for Toxic Tort, Hazardous Waste Disposal and Other Pollution Exposures, 25 *Idaho L. Rev.* 567, 575-76 (1989).

96. See *American Home Products Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1500-03 (S.D.N.Y. 1983), aff'd as modified, 748 F.2d 760 (2d Cir. 1984).

97. Accident-based CGL policies provided coverage under the following language:

"The company will pay on behalf of the insured all sums which the insured shall become obligated to pay as damages because of bodily injury or property damage caused by accident." Id. at 1502-03 (emphasis added).

98. Id. at 1500-01; see generally Salisbury, supra note 86, at 363-65.

99. American Home Products, 565 F. Supp. at 1500-01.

100. Id. at 1489; Clark v. London & Lancashire Indem. Co., 21 Wis. 2d 268, 124 N.W.2d 29 (1963). A large number of other courts, however, held that the pre-1966 policy covered gradual pollution damage. See, e.g., Aetna Casualty & Sur. Co. v. Martin Bros. Container & Timber Prod., 256 F. Supp. 145 (D. Or. 1966); City of Kimball v. St. Paul Fire & Marine Ins. Co., 190 Neb. 152, 206 N.W. 2d 632 (1973); Grand River Lime Co. v. Ohio Casualty Ins. Co., 32 Ohio App. 2d 178, 289 N.E.2d 360 (1972); Lancaster Area Refuse Autho. v. Transamerica Ins. Co., 437 Pa. 493, 263 A.2d 368 (1970); White v. Smith, 440 S.W.2 497 (Mo. Ct. App. 1969); Taylor v. Imperial Casualty & Indem. Co., 82 S.D. 298, 144 N.W.2d 856 (1966).

101. Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30, 33 (1st Cir. 1986) (emphasis added).

102. Id.

103. See American Home Products, 565 F. Supp. at 1500-03; see also supra notes 100 and accompanying text.

104. Gordon & Westendorf, supra note 95, at 575; Salisbury, supra note 86, at 364.

105. Salisbury, supra note 86, at 364-65; see also Ostrager & Newman, Handbook on Insurance Coverage Disputes, § 7.02 (1988) ("The purpose of amending the standard CGL form from an 'accident'-based policy to an 'occurrence'-based policy was to confirm that the insured event was not limited to sudden events, but also included 'personal injuries and property damage sustained as a result of gradual processes, or as a result of repeated exposures to the same or similar conditions.'") (citation omitted).

Case law reveals that an additional reason for the shift from accident-based to occurrence-based coverage was to clarify that the term "accident" was to be defined from the viewpoint of the insured policyholder, not the injured party. In other words, some courts were interpreting "accident" based on whether the injured party expected or intended the injury or

damage. In doing so, these courts were finding damages within the CGL policy even when the policyholder acted intentionally, or knew or should have known that his conduct or product caused damage. See, e.g., Moffat v. Metropolitan Casualty Ins. Co. of N.Y., 238 F. Supp. 165 (M.D. Pa. 1964) (damages resulting from an accident are within the CGL policy notwithstanding the fact that the insured knew or should have known of the nature of his products and the likelihood of causing damage); Lancaster Area Refuse Auth. v. Transamerica Ins. Co., 214 Pa. Super. 80, 251 A.2d 739, aff'd 437 Pa. 493, 263 A.2d 368 (1970) (court should not be concerned with insured's conduct being intentional or reckless).

106. Salisbury, supra note 86, at 364-66 (citing G. Bean, New Comprehensive General and Automobile Program, The Effect on Manufacturing Risks, paper presented at Mutual Insurance Technical Conference, Nov. 15-18, 1965, at 6) [hereinafter Bean]. Bean was a member of the committee that approved the standard policy language for the insurance industry trade associations.

107. Salisbury, supra note 86, at 365-66 (citing Bean, supra note 29, at 6, 10).

108. Salisbury, supra note 86, at 366 (citing Bean, supra note 29, at 6, 10) (emphasis omitted).

In a second paper Bean presented in early 1966, he made it even more clear that the new policy language was intended to cover gradual pollution damage. He explained that the new CGL policy would cover gradual bodily injury or gradual property damage "resulting over a period of time from exposure to the insured's waste disposal. Examples would be gradual adverse effects of smoke, fumes, air or stream pollution, contamination of water supply or vegetation." G. Bean, Summary of Broadened Coverage Under the New CGL Policies with Necessary Limitation to Make This Broadening Possible, at 1 (1966).

109. See Salisbury, supra note 86, at 366-68 (citing R. Elliot, The New Comprehensive General Liability Policy 4 (1965) (Secretary of the NBCU); Address by Lyman J. Baldwin, Jr. to the American Society Insurance Management (Oct. 20, 1965) (Secretary of Underwriting

at Insurance Company of North America and member of the Joint Drafting Committee); H. Mildrum, Implications of Coverage for Gradual Injury or Damages (presentation at Sheraton Boston Hotel, Nov. 11, 1965) (Hartford Insurance Company executive and insurance industry spokesman who participated in the drafting process)).

110. See generally 1 S. Miller & P. Lefebvre, Miller's Standard Insurance Policies Annotated 409 (1969 Supplement).

111. Gordon & Westendorf, supra note 95, at 575; see also Greenlaw, supra note 90, at 244; Salisbury, supra note 86, at 368-69. The pollution exclusion was originally adopted by the IRB at the 15 April 1970 meeting of the General Liability Governing Committee. Agenda & Minutes of the Insurance Rating Board Meeting of the General Liability Governing Committee (Mar. 17, 1970) (available in Exhibits to Brief of Amici Curiae American Petroleum Institute, Claussen v. Aetna Casualty & Sur. Co., 865 F.2d 1217 (11th Cir. 1989)).

112. Greenlaw, supra note 90, at 244-45.

113. Greenlaw, supra note 90, at 244-45 (citing Insurance Rating Board Confidential Circular to Board Members and Associate Members (May 15, 1970)) (emphasis added).

114. "Occurrence" in the standard CGL policy is defined as "an accident, including injurious exposure to conditions, which results during the policy period in bodily injury or property damages neither expected nor intended from the standpoint of the insured." Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30, 33 (1st Cir. 1986).

115. See infra Part V and accompanying notes.

116. Gold & Arfmann, supra note 94, at 347.

117. Id.; Stephen C. Jones, Debate Rages Over Insurance Coverage, Nat'l L. J., Feb. 24, 1992, at 20, 22 n.1.

In full, the 1986 CGL revision of the standard form pollution exclusion provides that coverage does not apply to:

(1) "Bodily injury" or "property damage" arising out of the actual, alleged, or threatened discharge, dispersal, release or escape of pollutants:

(a) at or from premises you own, rent, or occupy;

(b) at or from any site or location used by or for you or others for the handling, storage, disposal, processing or treatment of waste;

(c) which are at any time transported, handled, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible; or

(d) at or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:

- (i) if the pollutants are brought on or to the site or location in connection with such operations; or
- (ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.

(2) Any loss, cost, or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants. Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

Insurance Services Office, Inc., Commercial General Liability Program ed. 11-85: Explanatory Memorandum, CG00020286 at 2.

118. Gold & Arfmann, supra note 94, at 347. A 1987 GAO study indicates that as of 1987, only one principal insurance supplier was actively marketing pollution insurance under the EIL policy. A small group of other companies occasionally wrote pollution insurance policies as an accommodation to clients holding existing policies. In addition, there were only two reinsurers of pollution insurance on the market. (Reinsurers are companies that assume, for a share of the premium, a part of the potential liability risks that the insurance company underwrites.) United States General Accounting Office, Hazardous Waste: Issues Surrounding Insurance Availability, GAO/RCED-88-2, at 20-21 (Oct. 1987).

119. See generally John O'Leary, Coming Full CERCLA: The Release of Superfund Insurance Coverage Decisions from State Supreme Courts, Vol. 6, No. 3 A.B.A. Nat. Resources & Env't 31, 32 (Winter 1992).

120. Hoskins, supra note 16, at 10352.

121. Id.

122. Id.

123. See Eubank, supra note 33, at 203.

124. Translated "[a]gainst the party who proffers or puts forward a thing." Black's Law Dictionary 296 (5th ed. 1979); see also Salisbury, supra note 86, at 361-62; Greenlaw, supra note 90, at 271. Salisbury points out that one reason that courts apply rules such as contra proferentum that favor policyholders is because the insurance industry shares information and collaborates on policy terms in a way that would constitute antitrust violations in other industries.

Salisbury, supra note 86, at 361-62. Federal law, however, exempts the industry from significant aspects of the antitrust laws. 15 U.S.C. §§ 1011-1015 (1988).

125. United States v. Seckinger, 397 U.S. 203, 210 (1970) ("Among these principles [of contract interpretation] is the general maxim that a contract should be construed most strongly against the drafter")

126. See Jackson Township Mun. Util. Auth. v. Hartford Accident & Indem. Co., 186 N.J. Super. 156, 160, 451

A.2d 990, 992 (1982); Allstate Insurance Company v. Klock Oil, 73 A.D.2d 486, 426 N.Y.S.2d 603 (1980).

127. Jackson Township, 186 N.J. Super at 160, 451 A.2d at 992.

128. See, e.g., International Minerals & Chem. Corp. v. Liberty Mutual Ins. Co., 168 Ill. App. 3d 361, 371, 522 N.E.2d 758, 762 (1988); Reliance Ins. Co. v. Martin, 126 Ill. App. 3d 94, 96, 467 N.E.2d 287, 289 (1984) ("Where the terms of an insurance contract are ambiguous or are subject to more than one reasonable construction, the policies are to be liberally construed in favor of the insured."); Aetna Casualty & Surety Co. v. Haas, 422 S.W.2d 316, 321 (Mo. 1968) ("'Exclusion clauses are strictly construed against the insurer, especially if they are of uncertain import. An insurer may . . . cut off liability under its policy with a clear language, but it cannot do so with that dulled by ambiguity'"); Boswell v. Travellers Indem. Co., 38 N.J. Super. 599, 607, 120 A.2d 250, 254 (1956) ("Since insurance contracts are phrased by the insurer, it is for the insurer to make them so clear that they contain no ambiguity as to their meaning; otherwise

they must be construed most strongly against the insurer"). See also generally Salisbury, supra note 86, at 362; Greenlaw, supra note 90, at 271.

129. See, e.g., C.L. Hathaway & Sons Corp. v. American Motorist Ins. Co., 712 F. Supp. 265 (d. Mass. 1989); Fireman's Fund Ins. Co. v. Ex-Cell-O Corp., 702 F. Supp. 1317 (E.D. Mich. 1988); United States Fidelity & Guar. Co. v. Murray Ohio Mfg., 693 F. Supp. 617 (M.D. Tenn. 1988), aff'd 875 F.2d 858 (6th Cir. 1989); Borden, Inc. v. Affiliated F.M. Ins. Co., 682 F. Supp. 927 (S.D. Ohio 1987), aff'd 875 F.2d 858 (6th Cir. 1989); American Motorists Ins. v. General Host Corp., 667 F. Supp. 1423 (D. Kan. 1987); Centennial Ins. Co. v. Lumbermens Mut. Casualty Co., 677 F. Supp. 342 (E.D. Pa. 1987); Fischer & Porter Co., v. Liberty Mut. Ins. Co., 656 F. Supp. 132 (E.D. Pa. 1986); Hicks v. American Resources Ins. Co., 168 Ill. App. 3d 361, 522 N.E.2d 758 (1988), appeal denied, 122 Ill. 2d 576, 530 N.E.2d 246 (1988); Technicon Electronics Corp. v. American Home Assurance Co., 74 N.Y.2d 66, 542 N.E.2d 1048, 544 N.Y.S.2d 531 (1989); Waste Management v.

Peerless Ins. Co., 315 N.C. 688, 340 S.E.2d 374 (1986),
reh'g denied, 316 N.C. 368, 346 S.E.2d 134 (1986).

130. See, e.g., Diamond Shamrock Chemicals Co. v.
Aetna Casualty & Surety Co., No. C3939-84, (N.J. Super.
June 6, 1988).

131. Eagle Leasing Corp. v. Hartford Fire Ins. Co.,
540 F.2d 1257 (5th Cir. 1976).

132. See, e.g., Shell Oil Co. v. Accident & Casualty
Ins. Co. of Winterthur, No. 278-953, (San Mateo County
Cal. Super. Ct. July 13, 1988), cited in Gordon &
Westendorf, supra note 95, at 603 n.125.

133. 138 N.J. Super. 275, 350 A.2d 520 (1975), aff'd,
145 N.J. Super. 433, 368 A.2d 363 (1976), cert denied,
73 N.J. 57, 372 A.2d 322 (1977).

134. Id. at 278, 350 A.2d at 521.

135. Id. at 280, 350 A.2d at 522-23.

136. Id. at 281, 350 A.2d at 523.

137. Id. at 281-82, 350 A.2d at 523-24.
138. Id. at 281, 350 A.2d at 523.
139. Id.
140. Id. at 282, 350 A.2d at 524.
141. Id.
142. 64 A.D.2d 1014, 409 N.Y.S.2d 294 (1978).
143. Id. at 1014, 409 N.Y.S.2d at 295.
144. Id.
145. Id. at 1014, 409 N.Y.S.2d at 296.
146. 73 A.D.2d 486, 426 N.Y.S.2d 603 (1980).
147. Id. at 486-87, 426 N.Y.S.2d at 603-04.
148. Id. at 488, 426 N.Y.S.2d at 604.
149. Id.
150. Id. at 489, 426 N.Y.S.2d at 605.
151. Id. at 488-89, 426 N.Y.S.2d at 604-05.

152. Id. at 488-89, 426 N.Y.S.2d at 605 (citation omitted) (emphasis added).
153. 186 N.J. Super. 156, 451 A.2d 990 (N.J. Super. Ct. Law Div. 1982).
154. Id. at 159, 451 A.2d at 991.
155. Id. at 162-63, 451 A.2d at 993.
156. Id. at 160-64, 451 A.2d at 992-94.
157. Id. at 164, 451 A.2d at 994.
158. Id. at 164, 451 A.2d at 992-94.
159. Lansco, 138 N.J. Super. at 282, 350 A.2d at 524.
160. E.g., Pepper Indus., In. v. Home Ins. Co., 67 Cal. App. 3d 1012, 134 Cal. Rptr. 904 (1977); United States Aviex Co. v. Travelers Ins. Co., 125 Mich. App. 579, 336 N.W.2d 838 (Ct. App. 1983).
161. E.g., Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30 (1st Cir. 1984); American States Ins. Co. v. Maryland Casualty Co., 587

F. Supp. 1549 (E.D. Mich. 1984); CPS Chem. Co. v. Continental Ins. Co., 199 N.J. Super. 558, 489 A. 2d 1265 (1984).

162. 338 Pa. Super. 1, 487 A.2d 820 (Pa. Super. Ct. 1984).

163. Id. at 1-3, 487 A.2d at 820-22.

164. Id. at 8, 487 A.2d at 827.

165. 315 N.C. 688, 340 S.E.2d 374, reh'g denied, 316 N.C. 386, 346 S.E.2d 134 (1986).

166. Id. at 688-90, 340 S.E.2d at 374-76.

167. Id. at 694, 340 S.E.2d at 380.

168. Id.

169. Id. at 696-97, 340 S.E.2d at 380-81.

170. Id. at 699, 340 S.E.2d at 382.

171. Id. at 700-01, 340 S.E.2d at 383.

172. Id. at 700, 340 S.E.2d at 383.

173. Id. at 698-99, 340 S.E.2d at 381-82.
174. Id. at 699, 340 S.E.2d at 382.
175. 77 Or. App. 136, 711 P.2d 212 (Or. Ct. App. 1985), review denied, 301 Or. 76, 717 P.2d 631 (Or. 1986).
176. 77 Or. App. at 140-41, 711 P.2d at 214.
177. Id. (emphasis added).
178. 727 F.2d 30 (1st Cir. 1984).
179. Id. at 31.
180. Id. at 33-34.
181. See supra Part V.C. and accompanying notes. See also Nancer Ballard & Peter M. Manus, Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion, 75 Cornell L. Rev. 610, 618 n.24 (1990).
182. See supra Part V.B. and accompanying notes. See also Ballard & Manus, supra note 181, at 618 n.25.

183. 259 Ga. 333, 380 S.E.2d 686 (1989). In Claussen, the Georgia Supreme Court answered questions certified to it by Claussen v. Aetna Casualty & Sur. Co., 865 F.2d 1217 (11th Cir. 1987). The Georgia court's answer to the certified questions is contained as an Appendix to the decision in Claussen v. Aetna Casualty & Sur. Co., 888 F.2d 747 (11th Cir. 1989), rev'g 676 F. Supp. 1571 (S.D. Ga. 1987).

184. Id. at 333-34, 380 S.E.2d at 686-87.

185. Id. at 335-36, 380 S.E.2d at 688.

186. Id. at 335, 380 S.E.2d at 688.

187. Id. In so holding, the court explained:

[O]n reflection, one realizes that, even in its popular usage, "sudden" does not usually describe the duration of an event, but rather its unexpectedness; a sudden storm, a sudden turn in the road, sudden death. Even when used to describe the onset of an event, the word has an

elastic temporal connotation that varies with expectations: Suddenly, it's spring.

188. Id. at 336, 380 S.E.2d at 689.
189. Id.
190. Id. at 337, 380 S.E.2d at 689.
191. Id.
192. 155 Wis. 2d 737, 456 N.W.2d 570 (1990), reconsid. denied and opin. modified, 461 N.W.2d 447 (Wis. 1990).
193. Id. at 742, 456 N.W.2d at 572.
194. Id. at 745, 456 N.W.2d at 573.
195. Id. at 747, 456 N.W.2d at 573.
196. Id. at 748-52, 456 N.W.2d at 574-75.
197. Id. at 760, 456 N.W.2d at 578.
198. Id. at 742, 456 N.W.2d at 575.
199. 933 F.2d 1162 (3d Cir. 1991).
200. Id. at 1168-69.

201. Id.

202. Id. at 1169.

203. See Barry R. Ostrager, Insurance Coverage Issues Arising Out of Hazardous Waste/Environmental Clean-Up Litigation, ALI-ABA Course of Study 1061, 1063 (June 24, 1991).

204. See International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co., 168 Ill. App. 3d 361, 522 N.E.2d 758, 767 ("if there were no "occurrence," there would be no coverage in the first instance and it would be unnecessary to reach the question whether the pollution exclusion clause applied.").

205. Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30, 33 (1st Cir. 1986).

206. Greenlaw, supra note 90, at 244-45 (citing Insurance Rating Board Confidential Circular to Board Members and Associate Members (May 15, 1970)) (emphasis added).

207. See New Castle County & Hartford Accident & Indem. Co., 933 F.2d 1162, 1168-69 (3d Cir. 1991) (the occurrence clause focuses on damages, whereas the pollution exclusion clause focuses on discharge); United States Fidelity & Guar. Co., v. Star Fire Coals, Inc., 856 F.2d 31, 35 (6th Cir. 1988) ("While the district court may have been correct that the damage resulting from the discharges were unintended and unexpected, that is not the ultimate question. The ultimate question is whether the discharges of coal dust were sudden and accidental."); Technicon Electronics Corp. v. American Home Assurance Co., 141 A.D.2d 124, 144, 533 N.Y.S.2d 91, 94 (1988) aff'd, 74 N.Y.2d 66, 542 N.E.2d 1048, 544 N.Y.S.2d 531 (1989) ("The relevant factor is not whether the policy holders anticipated or intended the resultant injury or damage, but whether the toxic material was discharged into the environment unexpectedly and unintentionally or knowingly and intentionally.")

208. Thomas L. Ashcroft, then Secretary, Policyholders Service Division, Insurance Company of North America, in speaking before a convention of the Federation of

Insurance Counsel, revealed that while "there is no question as to intent, that is, that the pollution exclusion coverage is confined to the unintended sudden happening or accident, just what is or is not sudden has puzzled insurance men since the advent of liability insurance." Thomas L. Ashcroft, Ecology, Environment, Insurance and the Law, 21 Fed'n of Ins. Couns. Q: 37, 54-55 (1970-71).

209. Chesler, Rodburg, & Smith, Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability, 18 Rutgers L.J. 9, 37 (1986), cited in Greenlaw, supra note 90, at 245 n.73.

210. Notice of Proposed Rulemaking and Request for Comment Regarding Insurance for Waste Disposal Industry, 50 Fed. Reg. 33,905 (1985). The EPA has speculated that the insurance industry, in including the pollution exclusion clause in the policy, was aware of its potential ambiguity.

211. Salisbury, supra note 86, at 369-71. Salisbury alleges that the insurance industry has made it very difficult to obtain drafting history materials which

would aid in understanding the purpose and intent of the pollution exclusion clause. Id. at 369, n.36. The Insurance Services Office (ISO), which is the custodian for such material, routinely refuses discovery of the documents unless the parties agree to a protective order that will keep the material secret. The drafting history documents that are available are generally those introduced as exhibits insurance coverage lawsuits in which a protective order was not granted. Id.

212. Salisbury, supra note 86, at 370-71. The minutes of a March 1970 meeting of the General Liability Governing Committee of the IRB include the following discussion:

[C]overage for pollution may not be provided in most cases under present policies because the damages could be said to be expected or intended and thus be excluded by the definition of occurrence and, therefore, the adoption of an exclusion could be said to be a clarification, but a necessary one to avoid any question of intent.

Id. at 370 (quoting Minutes of the Meeting of the General Liability Governing Committee of the Insurance Rating Board, Mar. 17, 1970) (emphasis added).

213. Salisbury, supra note 86, at 371 (quoting Letter from Mutual Rating Bureau to Members and Subscribers Writing General Liability Insurance (June 9, 1970)).

214. 1 S. Miller & P. Lefebvre, Miller's Standard Insurance Policies Annotated 409 (1989 supplement) (emphasis added).

215. Greenlaw, supra note 90, at 247 (citing Stamos, Pollution and Its Insurance Implications, Aetna-izer, July-Aug. 1971, at 6 (available in Exhibits to Brief of Amici Curiae American Petroleum Institute, Claussen v. Aetna Casualty & Sur. Co., 865 F.2d 1217 (11th Cir. 1989))).

216. See generally Salisbury, supra note 86, at 372-74. Salisbury notes that courts often consider statements by drafters of standard-form insurance contracts to be dispositive of the question of the

parties' intent. The author cites a California Superior Court judge as concluding that "[t]he primary evidence on the intent of the parties drafting the contracts, and their expectations about scope of coverage, will be obtained through document productions from key industry-wide organizations, and depositions of their personnel." Travelers Reply Memorandum in Support of Coordination at 7-8 (filed Jan. 8, 1981), *Armstrong Cork Co. v. Aetna Casualty and Sur. Co.*, No. C315367 (Cal. Super. Ct., L.A. County) (quoted in Salisbury, supra note 86, at 367, n.31).

217. For example, the Manager of the IRB wrote to the Georgia Insurance Department:

The impact of the new proposals in the vast majority of risks would be no change. It is rather a situation of clarification which will make for a complete understanding by the parties to the contract of the intent of coverage. Coverage for expected or intended pollution and contamination is not now present as it is excluded by the definition of occurrence. Coverage for

accidental mishaps is continued except for the risks described in the filing.

Letter from R. Stanley Smith to Georgia Ins. Dep't (June 10, 1970) (emphasis added) (attached as appendix to decision in Claussen v. Aetna Casualty & Sur. Co., 676 F. Supp. 1561 (S.D. Ga. 1987)).

Representatives of the MIRB presenting the pollution exclusion policy for approval made similar representations. They explained that the pollution exclusion clause was intended to clarify "that the definition of occurrence excludes damages that can be said to be expected or intended." Statement by MIRB to West Virginia Commissioner of Insurance (cited in Just v. Land Reclamation, Ltd., 155 Wis. 2d 737, 742, 456 N.W.2d 570, 575 (1990), motion for reconsideration denied and opinion modified, No. 88-1656 (Wis. Sept. 19, 1990)).

Based on statements made by insurance industry representatives, the West Virginia Insurance

Commissioner approved the pollution exclusion, noting the following:

(1) The said companies and rating organizations have represented to the Insurance Commissioner, orally and in writing, that the proposed exclusions ... are merely clarifications of existing coverage as defined and limited in the definition of the term "occurrence," contained in the respective policies to which said exclusion would be attached.

(2) To the extent that said exclusions are mere clarifications of existing coverages, the insurance Commissioner finds that there is no objection to the approval of such exclusions.

Proceedings Before Samuel H. Weese, Insurance Commissioner of West Virginia, In re "Pollution and Contamination" Exclusion Filings, Admin. Hearing N. 70-4, Order at 3 (Aug. 19, 1970) (emphasis added).

218. See Greenlaw, supra note 90, at 246.

219. Hoskins, supra note 16, at 10351-52 (Aug. 1989).

220. Ballard & Manus, supra note 181, at 630. See also Ostrager, supra note 203, at 6-9.

221. Hoey, The Meaning of "Accident" in Boiler and Machinery Insurance and New Developments in Underwriting, cited in Salisbury, supra note 86, at 379-80.

222. Hoey, supra note 221, at 468-69; see also Anderson & Middleton Lumber Co. v. Lumbermen's Mut. Casualty Co., 53 Wash. 2d 404, 333 P.2d 938, (1959); New England Gas & Electric Association v. Ocean Accident & Guaranty Corp., 330 Mass. 640, 116 N.E.2d 671 (1953).

223. Salisbury, supra note 86, at 376-77 n.52. See, e.g., Fireguard Sprinkler Sys., Inc. v. Scottsdale Ins. Co., 864 F.2d 648 (9th Cir. 1988); Just v. Land Reclamation, Ltd., 155 Wis. 2d 737, 456 N.W.2d 570 (1990); Claussen v. Aetna Casualty & Sur. Co., 380 S.E.2d 686 (Ga. 1989); United States Fidelity & Guar.

Co. v. Specialty Coatings Co., 180 Ill. App. 3d 378, 535 N.E.2d 1071 (1989); Kipin Indus. Inc. v. American Universal Ins. Co., 41 Ohio App. 3d 228, 535 N.E.2d 334 (1987); Broadwell Realty Services, Inc. v. Fidelity & Casualty Co., 218 N.J. Super. 516, 528 A.2d 76, (1987). See also Appendix A, infra for a compilation of cases by jurisdiction interpreting the pollution exclusion clause.

224. Hapke, supra note 17, at 7.

225. Id.

226. 42 U.S.C. § 9607(a)(4) (1988).

227. Id. § 9606(a) (1988).

228. Hapke, supra note 17, at 9.

229. Hapke, supra note 17, at 7.

230. Gordon & Westendorf, supra note 95, at 584.

231. Id. See, e.g., Continental Ins. Cos. v.

Northeastern Pharmaceutical & Chem. Co. Inc. (NEPACCO I), 811 F.2d 1180 (8th Cir. 1987) (panel opinion), rev'd on other grounds on reh'g en banc, 842 F.2d 977

(8th Cir. 1988); Port of Portland v. Water Quality Ins. Syndicate, 549 F. Supp. 233 (D. Or. 1982), modified on other grounds, 796 F.2d 1188 (9th Cir. 1986); United States Fidelity & Guaranty Co. v. Thomas Solvent Co., 683 F. Supp. 1139 (W. D. Mich. 1988); New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359 (D. Del. 1987); United States Aviex Co. v. Travelers Ins. Co., 125 Mich. App. 579, 336 N.W.2d 838 (1983); Lansco, Inc. v. Dept. of Environmental Protection, 138 N.J. Super. 275, 350 A.2d 520 (1970), aff'd, 145 N.J. Super. 433, 368 A.2d 363, cert. denied, 73 N.J. 57, 372 A.2d 322 (1977).

232. 804 F.2d 1325 (4th Cir. 1986).

233. Id. at 1326.

234. 42 U.S.C. § 9607(a) (1988).

235. Mraz, 804 F.2d at 1329 (quoting 42 U.S.C. § 9601(16) (1988)).

236. Id. at 1327-28.

237. Id. at 1329.

238. 811 F.2d 1180 (8th Cir. 1987), rehearing en banc, 842 F.2d 977 (8th Cir.); cert. denied, 109 S. Ct. 66 (1988).

239. NEPACCO I, 811 F.2d at 1187 (quoting Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907)). In contrast, the en banc Fourth Circuit in NEPACCO II analyzed damages strictly in the insurance context, not engaging in the analysis of whether property damage had occurred. Continental Insurance Cos. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977 (8th Cir.), cert. denied, 109 S. Ct. 66 (1988).

240. NEPACCO I, 811 F.2d at 1187.

241. See, e.g., Cincinnati Ins. Co. v. Milliken & Co., 857 F.2d 979 (4th Cir. 1988); Continental Insurance Cos. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977 (8th Cir. 1988); Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348 (4th Cir. 1987).

242. E.g., Jones Truck Lines v. Transport Ins. Co., No. 88-5723 (E.D. Pa. May 10, 1989); New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359 (D. Del. 1987).

243. For example, in Jones Truck Lines v. Transport Ins. Co., No. 88-5723 (E.D. Pa. May 9, 1989), question certified, No. 89-1729/59 (3d Cir. Feb. 15, 1990), question declined, No. 72650 (Mo. July 13, 1990), the court found that the Eighth Circuit in Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO II), 842 F.2d 977 (8th Cir.) (en banc), cert. denied, 109 S.Ct 66 (1988), had clearly misread Missouri state law.

Similarly, the D.C. Circuit Court of Appeals recently rejected the Eighth Circuit's reading of Missouri law. Finding the state's law unsettled because state appellate courts had not spoken to the issue, the D.C. Circuit found that the NEPACCO court failed to apply basic principles of contract construction under Missouri law. Independent Petrochemical Corp. v. Aetna Casualty & Surety Co., No. 89-5367, slip op. at 9-10 (D.C. Cir. Sept. 13, 1991).

244. Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1353 (4th Cir. 1987), cert. denied, 484 U.S. 1008 (1988).

245. Id.

246. See, e.g., Aetna Casualty & Surety Co., v. Hanna, 224 F.2d 499 (5th Cir. 1955); Crist v. Ins. Co. of North America, 529 F. Supp. 601 (D. Utah 1982); Haines v. St. Paul & Marine Ins. Co., 428 F. Supp. 435 (D. Md. 1977); Jaffe v. Cranford Ins. Co., 168 Cal. App. 3d 930, 214 Cal. Rptr. 567 (Cal. App. 1985); Board of Education v. Country Mutual Ins. Co., 121 Ill. App. 3d 124, 459 N.E.2d 273 (1984); City of Thief River Falls v. United Fire & Casualty Co., 336 N.W.2d 274 (Minn. 1983); O'Neill Investigations, Inc. v. Illinois Employers Ins. of Wasau, 636 P.2d 1170 (Alaska 1981).

247. Ostrager, supra note 203, at 18.

248. United States v. Price, 688 F.2d 204, 212 (3d Cir. 1982).

249. See Maryland Dept. of Human Resources v. Dept. of Health & Human Services, 763 F.2d 1441, 1446 (D.C. Cir. 1985).

250. Hoskins-Western-Sonderegger, Inc. v. American &

Foreign Ins. Co., No. 402, slip op. at 5 (D. Neb. Feb. 1, 1989).

251. 822 F.2d 1348 (4th Cir. 1987), cert. denied, 484 U.S. 1008 (1988).

252. 822 F.2d at 1350.

253. Id. at 1352.

254. The typical CGL policy provides (in pertinent part) that [t]he insurer will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of ... property damages to which this insurance applies. The court reasoned that the addition of the words "as damages" restricts the insurer's coverage from any financial obligation of the insured. Id.

255. 822 F.2d at 1353.

256. 842 F.2d 977 (8th Cir.) (en banc), cert. denied, 109 S.Ct. 66 (1988).

257. In addition to dumping the barrels, NEPACCO had also hired a firm to dispose of additional hazardous

materials, which was done by mixing the dioxin-laced wastes with oil and applied as a dust suppressant on area roads. In addition, dirt contaminated with NEPACCO's hazardous wastes was sold to an individual to used as a landfill on his property. Id. at 979.

258. 42 U.S.C. § 6973(a) (1988).

259. 42 U.S.C. §§ 9604, 9606, 9607 (1988).

260. United States v. Northeastern Pharmaceutical & Chem. Co., 811 F.2d 1180 (1987).

261. See supra notes 238-40 and accompanying text.

262. Id. at 1189.

263. Id.

264. Id. at 985-87.

265. Id. at 985-86.

266. Id. at 985. Quoting Maryland Casualty, the NEPACCO court stated: "If the term 'damages' is given the broad, boundless connotations sought by the [insured], then the term 'damages' in the contract . .

. would become mere surplusage, because any obligation to pay would be covered. The limitation implied by employment of the phrase 'to pay as damages' would be obliterated." Id. (quoting Maryland Casualty, 822 F.2d at 1352).

The Eighth Circuit reached a similar result in the 1991 decision Grisham v. Commercial Union Ins. Co., 927 F.2d 1039 (8th Cir. 1991). Grisham involved environmental claims arising from ownership and operation of a wood treatment facility from which, over the course of twenty years, facility operators had pumped chemical preservatives onto the ground as a means of weed and dust control. Among other actions, the EPA issued an order under CERCLA § 106(a), 42 U.S.C. § 9606(a) (1988), ordering specific remedial actions with respect to releases or threatened releases. No payment to the government or third parties was sought.

The district court relied on NEPACCO, holding that Arkansas law was substantially similar to Missouri law as applied in NEPACCO. In affirming the lower court's decision, the Eighth Circuit gave substantial deference

to the district court. The result was not surprising, considering that NEPACCO was also an Eighth Circuit case.

267. NEPACCO II, 842 F.2d at 987.

268. E.g., Grisham v. Commercial Union Ins. Co., 927 F.2d 1039 (8th Cir. 1991); Johnson v. Aetna Casualty & Surety Co., No. 86-3305-WD (D. Mass. June 29, 1990); Travelers Indem. Co. v. Allied-Signal, Inc., 718 F. Supp. 1252 (D. Md. 1989); Argonaut Ins. Co. v. Atlantic Wood Indus., Inc., No. 87-0323-R (E.D. Va. June 20, 1988); Fort McHenry Lumber Co. v. Pennsylvania Lumbermen's Mut. Ins. Co., No. HAR 88-825 (D. Md. Sept. 28, 1988); Hayes v. Maryland Casualty Co., 688 F. Supp. 1513 (N.D. Fla. 1988); Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., No. 83-3347 (D.D.C. Sept. 7, 1988); Travelers Ins. Co. v. Ross Elec., Inc., 685 F. Supp. 742 (W.D. Wa. 1988); Verlan, Ltd. v. John L. Armitage & Co., 695 F. Supp. 950 (N.D. Ill 1988). See also Appendix B, infra, for a compilation of cases addressing the "as damages" issue.

269. E.g., Boeing v. Aetna Casualty & Surety Co., 113

Wash. 2d 869, 784 P.2d 507 (1990); C.D. Spangler Co. v. Industrial Crankshaft & Engineering Co., 326 N.C. 133, 388 S.E.2d 557 (1990); Jones Truck Lines v. Transport Ins. Co., No. 88-5723 (E.D. Pa. May 10, 1989), question certified, Nos. 89-1729/59 (3d Cir. Feb 15, 1990), question declined, No. 72650 (Mo. July 13, 1990); Aerojet General Corp. v. Superior court, 209 Cal. App. 3d 973, 257 Cal. Rptr. 621 (1st Dist.), modified and reh'g denied, 211 Cal. App. 3d 216, 258 Cal. Rptr. 684 (1st Dist. 1989). See also Appendix B, infra, for a survey of cases addressing the "as damages" issue.

270. E.g., Fireman's Fund Ins. Co. v. Ex-Cell-O Corp., 662 F. Supp. 71, 75 (E.D. Mich. 1987).

271. 887 F.2d 1200 (2d Cir. 1989), reh'g denied, 894 F.2d 498, cert denied, 110 S. Ct. 2588 (1990).

272. Id. at 1201.

273. Id.

274. Id. at 1207.

275. Id.

276. 928 F.2d 1131 (3d Cir. 1991).

277. 42 U.S.C. § 9607(a) (1988).

278. Susquehanna, 928 F.2d at 173.

279. Id., (citation omitted).

280. Id.

281. Id. The court did, however, find a limit to coverage for CERCLA response costs. Under Pennsylvania law, the measure of damages for injury to property, if the injury is reparable, is the cost of repairs, unless such cost is equal to or greater than the value of the damaged property. Therefore CERCLA response costs are covered only to the extent that they do not exceed the value of the property. Id. Hence, noted the court, the fears of some courts that deciding for coverage would impose unlimited liability upon insurers need not be addressed. Id. at n.8.

282. NEPACCO II, 842 F.2d at 985-86 (construing Missouri law).

283. NEPACCO II, 842 F.2d at 985-86. The 4th Circuit applied the same flawed analysis in Cincinnati Insurance Co. v. Milliken and Co., 857 F.2d 979 (4th Cir. 1988) (applying South Carolina law).

284. 944 F.2d 940 (D.C. Cir. 1991).

285. The plaintiffs arranged for disposal of a customer's waste material containing dioxin; the hazardous waste was NEPACCO's. Independent Petrochemical, 944 F.2d at 942-43.

286. Id. at 945.

287. Id. at 946 (quoting Hammontree v. Central Mut. Ins. Co., 385 S.W.2d 661, 666 (Mo. App. 1965)).

288. Id. at 947 (citations omitted).

289. Id.

290. Aetna Casualty & Surety Co., Inc. v. Pintlar Corp., 948 F. 2d 1507, 1513 (9th Cir. 1991).

291. To facilitate cleanup and avoid the costs of litigation, federal and state governments often enter

into a consent decree or settlement that requires the policyholder to perform cleanup operations. Such settlements, which contain injunctive orders, have in the past resulted in a denial of coverage.

Consequently, insureds might refuse to enter into consent decrees, choosing to wait for the government to sue for its costs after cleanup. Although coverage for such costs has, too, been denied in past, insureds may decide that it is in their best interest to wait and hope for a more favorable coverage decision on the judicially-mandated liability. Hapke, supra note 17, at 20-21.

A recent Massachusetts Supreme Court ruling illustrates this situation. In Augat Inc. v. Liberty Mutual Ins. Co., No. S-5578 (Mass. June 14, 1991), a company executed a consent decree with the state in which it agreed to perform environmental cleanup at its own expense. After performing the cleanup the company filed a claim for its costs with its insurer, who refused to pay, claiming that the company incurred its obligations voluntarily. The Massachusetts Supreme Court held that the insurer was not liable for the

company's costs because the company had violated the insurance policy's voluntary payment provision by agreeing to pay for the cleanup.

292. Independent Petrochemical Corp. v. Aetna Casualty & Sur. Corp., 944 F.2d 940, 946 (D.C. Cir. 1991).

293. 112 S. Ct. 40 (1991).

294. Parker Solvents Co. v. Royal Ins. Cos. of America, 1991 U.S. App. LEXIS 15972 (8th Cir. Mar. 12, 1991).

295. Parker Solvents Co. v. Royal Ins. Cos. of America, 1991 U.S. App. LEXIS 15972, at 2-3 (8th Cir. Mar. 12, 1991).

296. Salve Regina College v. Russell, 111 S.Ct. 1217 (1991).

297. Gordon & Westerndorf, supra note 95, at 572.

298. Id. The authors suggest that if a policy cannot be located, the insured may attempt to prove its existence by secondary evidence such as letters,

canceled checks, and statements of agents who issued the policy.

299. See supra Part IV.C.1.

300. See supra Part IV.C.2.

301. As discussed supra in Parts IV.C.2 and V.E, determining whether there has been a covered occurrence also entails an examination of the "expected or intended" language of the CGL policy. As previously noted, the courts have been inconsistent in interpreting the terms. Therefore it is essential to analyze the insured's knowledge, intent, and degree of foreseeability, as well as to determine whether the pollution occurred as a regularly conducted business activity.

302. Gordon & Westendorf, supra note 95, at 596-97. As a general rule, the owned property exclusion will not automatically bar coverage for an insured who expends funds for preventive measures on his own property in response to government directives designed to abate the discharge of pollutants onto adjacent lands. See, e.g., Broadwell Realty Services, Inc. v.

The Fidelity & Casualty Co. of New York, 218 N.J. Super. 516, 528 A.2d 76 (1987); CPS Chemical Co., Inc. v. Continental Ins. Co., 536 A.2d 311 (N.J. Super. A.D. 1988); Bankers Trust Co. v. Hartford Accident & Indem., 518 F. Supp. 371 (S.D.N.Y. 1981).

303. See supra Parts IV.C.3 and V.

304. See supra notes 211-23 and accompanying text.

305. Eubank, supra note 33, at 174.

306. Insurance Issues & Superfund: Hearing Before the Senate Commission on Environment & Public Works, 99th Cong., 1st Sess. 61, at 99 (1985) (statement by the American Insurance Association).

307. See supra notes 282-92 and accompanying text.

See also Appendix B, infra, for a compendium of cases by jurisdiction addressing the issue of whether Superfund response costs constitute damages under the CGL policy.

308. See supra notes 241-68 and accompanying text.